In the

United States Court of Appeals

For the Seventh Circuit

No. 9753

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

MORTON SALT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

J-29790 The Gunthorp-Warren Printing Co., Chicago—12-30-48—65

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1 Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of July (it being the 5th day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-Eight and of the Independence of the United States of America, the 173rd year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Friday, August 20, 1948.

Court met pursuant to adjournment.

Present Honorable Philip L. Sullivan, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

United States of America,
Plaintiff,
vs.
Morton Salt Company,
Defendant.
} No. 48 C 698.

Be It Remembered, that, on to-wit, the 18th day of May, 1948, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-698) * *

COMPLAINT.

Plaintiff, by Otto Kerner, Jr., United States Attorney in and for the Northern District of Illinois, acting under the direction of the Attorney General, upon request of the Federal Trade Commission, brings this action for the enforcement of an order of the Federal Trade Commission which required defendant to file a special report and for the recovery of forfeitures because of the failure of the defendant to comply with the said order.

1. The action arises under Title 15, U. S. C. A., Section 49, being Section 9 of the Act of September 26, 1914 (38 Stat. 717), as amended March 21, 1938 (52 Stat. 111) (the said Act as amended being hereinafter referred to as the "Act"), vesting the several district courts of the United States with specific jurisdiction to enter orders commanding a corporation to comply with any order issued by the Federal Trade Commission pursuant to the
4 said Act, and under Title 15, U. S. C. A., Section 50, being Section 10 of the said Act, vesting any district

court of the United States in which a corporation has its principal office or in which it does business with specific jurisdiction of suits by the United States for the recovery of forfeitures if the corporation shall fail to file any special report required by the said Act within the time fixed by the Federal Trade Commission for filing the same, as hereinafter more fully appears.

2. The defendant, Morton Salt Company, is an inhabitant of the Northern District of the State of Illinois. It is a corporation organized and existing under the laws of that state, and has its principal place of business at 310 South Michigan Avenue, Chicago, Illinois. The defendant transacts a substantial part of its business in the Northern District of the State of Illinois.

3. During all the times herein mentioned defendant was engaged in the business of producing various types and grades of salt, and of selling and distributing such salt in interstate commerce, as "commerce" is defined in Title 15, U. S. C. A., Section 44, being Section 4 of the said Act.

4. The Federal Trade Commission, on September 2, 1947, issued an order pursuant to the provisions of Rule XXVI of its published Rules of Practice (12 Fed. Reg. 5444, 5448), promulgated under and in accordance with the provisions of Title 15, U. S. C. A., Section 46(g), being subsection (g) of Section 6 of the said Act, and pursuant to the provisions of Title 15, U. S. C. A., Section 46(a) and 46(b), being subsections (a) and (b) of Section 6 of the said Act, requiring the defendant to file a report with the Federal Trade Commission within 30 days after the date of service of the order. A true and complete copy of the said Rule XXVI is attached hereto marked "Exhibit A" and made a part hereof. The said order dated September 2, 1947, requiring the defendant to file the report is set forth in full below:

UNITED STATES OF AMERICA.

Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 2nd day of September, A. D. 1947.

Commissioners:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

ORDER REQUIRING ADDITIONAL REPORTS OF COMPLIANCE FROM CERTAIN RESPONDENTS.

This matter coming on to be considered on the Commission's own motion and upon further consideration of the reports of compliance with the order to cease and desist heretofore received and filed on behalf of the respondents under dates of August 2 and August 3, 1943, and the Commission being of the opinion that the public interest requires that there be filed on behalf of the respondents named below, an additional and supplemental report showing the manner and form of compliance with the modified order to cease and desist entered by the Commission on August 10, 1943, and with the decree of the Circuit Court of Appeals for the 7th Circuit entered on April 22, 1943, and pursuant to Rule XXVI of its
6 published Rules of Practice, and the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (38 Stat. 721; 15 U. S. C. A. Sec. 46).

Now, Therefore, Be It Ordered that respondents Salt Producers Association; Avery Salt Company; Barton Salt Company; Carey Salt Company, Cayuga Rock Salt Company; Colonial Salt Company; Detroit Rock Salt Company; Diamond Crystal Salt Co., Inc.; International Salt Company; Jefferson Island Salt Company, Inc.; Hardy

Salt Company; Morton Salt Company; Myles Salt Company, Ltd.; Mulkey Salt Company; Ohio Salt Company; Ruggles & Rademaker Salt Company; Saginaw Salt Products Company; Union Salt Company; Watkins Salt Company; and American Salt Corporation, within thirty (30) days after service upon them of this order, shall file additional reports showing in detail the manner and form in which they have been, and are now, complying with said modified order to cease and desist and said decree of the United States Circuit Court of Appeals for the 7th Circuit;

It Is Further Ordered that there shall be submitted, as a part of such supplemental reports of compliance, a complete statement on the part of each of the producer respondents named above, of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944;

It Is Further Ordered that there shall be submitted as a part of such supplemental report of compliance on the part of respondent Salt Producers Association a statement of the present organization and objectives of said respondent association, together with a detailed description of all activities and services supplied to or conducted by said respondent association for or on behalf of its members from January 1, 1944, to date.

By the Commission.

Otis B. Johnson,
Secretary.

7 5. The order dated September 2, 1947, was served on the defendant by registered mail on September 4, 1947. A true and complete copy of the return receipt signed by the defendant showing service of the said order is attached hereto marked "Exhibit B" and made a part hereof.

6. The Federal Trade Commission, on September 22, 1947, issued its order extending until November 1, 1947, the time for filing the report required by its order dated September 2, 1947. A true and complete copy of the said order dated September 22, 1947, is attached hereto marked "Exhibit C" and made a part hereof.

7. The order dated September 22, 1947, was served on the defendant by registered mail on September 24, 1947. A true and complete copy of the return receipt signed by the defendant showing service of the said order is attached hereto marked "Exhibit D", and made a part hereof.

8. The Federal Trade Commission, on February 27, 1948, pursuant to Title 15, U. S. C. A., Section 50, being Section 10 of the said Act, issued its notice of default to defendant because of defendant's failure to file the report required by the order dated September 2, 1947. The notice of default is set forth in full below:

UNITED STATES OF AMERICA.

Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of February, A. D. 1948.

Commissioners:

Robert E. Freer, Chairman,
Garland S. Ferguson,
Ewin L. Davis,
William A. Ayres,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

Notice of Default to Morton Salt Company.

Whereas the Federal Trade Commission on September 2, 1947, pursuant to Rule XXVI of its published Rules of Practice and to the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (38 Stat. 721), issued its order requiring Morton Salt Company, a corporation, to file an additional and supplemental report within thirty days after service upon it of the said order showing in detail the manner and form in which it has been, and is now, complying with the modified order to cease and desist issued by the Commission on August 10, 1943, and further requiring Morton Salt Com-

pany to submit as a part of its supplemental report of compliance "a complete statement * * * of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944"; and

Whereas the said order of the Commission dated September 2, 1947, was duly served upon Morton Salt Company by registered mail on September 4, 1947; and

Whereas the Commission, on September 22, 1947, issued its order extending the time for filing the said supplemental report of compliance until November 1, 1947; and

Whereas Morton Salt Company has failed to file the supplemental report of compliance containing the information required by the Commission's said order dated September 2, 1947, on or before November 1, 1947, or at any time thereafter prior to the date of this resolution, and no additional time having been requested by Morton Salt Company or granted by the Commission for the filing of the said report; and

Whereas Section 10 of the Federal Trade Commission Act (38 Stat. 723) provides in part as follows:

"If any corporation required by this Act to file any annual or special report shall fail so to do within the
9 time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

Now, Therefore, You, Morton Salt Company, Are Hereby Notified, as provided for in Section 10 of the Federal Trade Commission Act (38 Stat. 723), that you are in default in having failed to file the report containing the information required by the Commission's order dated September 2, 1947, on or before November 1, 1947, or at any time thereafter.

By the Commission.

Otis B. Johnson,
Secretary.

9. The said notice of default dated February 27, 1948, was served on the defendant by registered mail on March 1, 1948. A true and complete copy of the return receipt signed by the defendant showing service of the notice of default is attached hereto marked "Exhibit E" and made a part hereof.

10. The failure of the defendant to file the report required by the order of the Federal Trade Commission dated September 2, 1947, has continued for 30 days after notice of such default and is still continuing.

11. The defendant, because of its failure to file with the Federal Trade Commission on or before April 1, 1948, the report required by its order of September 2, 1947, is liable to pay to the United States a forfeiture in the sum of $100 for each and every day of the continuance of such failure.

10 Wherefore, Plaintiff Demands:

1. That the court issue a mandatory injunction commanding defendant, its agents, attorneys, employees and assigns to file with the Federal Trade Commission the report required by its order dated September 2, 1947.

2. Judgment against defendant in the amount of $100 a day for each and every day from and after April 1, 1948, the defendant has failed to file with the Federal Trade Commission the report required by its order of September 2, 1947.

3. That defendant pay the costs of this action.

4. That plaintiff be given such other and further relief as the court may deem just and proper.

United States of America,
By Otto Kerner, Jr.,
United States Attorney,
Chicago, Illinois.

J. Stephen Doyle,
Special Assistant to the Attorney General, United States Department of Justice,
Washington, D. C.

Joseph S. Wright,
Assistant General Counsel,
Federal Trade Commission,
Washington, D. C.

J. B. Truly,
Special Attorney, Federal Trade Commission, Washington, D. C.

11 District of Columbia, } ss.
City of Washington. }

Otis B. Johnson, being first duly sworn, deposes and says that he is the Secretary of the Federal Trade Commission; that he makes this affidavit on behalf of the plaintiff in the foregoing complaint; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

Otis B. Johnson.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 28th day of April, 1948.

Denis E. Connell,
(Seal) *Notary Public.*

My commission expires March 11, 1951.

12 Exhibit A.

Rule XXVI.

REPORTS SHOWING COMPLIANCE WITH ORDERS AND WITH STIPULATIONS.

In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts, or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; provided, however, that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination; and provided further that

where the order prevents the use of a false advertisement of a food, drug, device, or cosmetic, which may be injurious to health because of results from such use under the conditions prescribed in the advertisement, or under such conditions as are customary or usual, or if the use of such advertisement is with intent to defraud or mislead, an interim report stating whether and how respondents intend to comply shall be filed within ten days.

13 Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation.

Reports of compliance shall be signed in ink by respondents or by the parties stipulating.

14 Exhibit B.

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1. Morton Salt Co.
(Signature or name of addressee)
2. S. Thomson
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery 9-4, 1947.

(Pencil notation) 4320 Order requiring additional reports of compliance from certain respondents 52.

Post Office Department
Official Business

Penalty for Private Use
To Avoid Payment
of Postage, $300

Postmark of Delivering Office

55 Chicago
Sep 4
8 PM
1947
Ill.

Return to Federal Trade Commission
(Name of Sender)
Street and Number,
or Post Office Box
Washington, D. C.

Registered Article
No. 370804
Insured Parcel
No.

15 Exhibit C.

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 22nd day of September, A. D. 1947.

Commissioners:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

ORDER EXTENDING TIME FOR FILING ADDITIONAL REPORTS OF ~~COMPLIANCE~~.

This matter coming on to be considered by the Commission upon the request of counsel for respondent Hardy Salt Company for an extension of time until November 1, 1947, within which to file additional reports of compliance pursuant to the Commission's order requiring same under date of September 2, 1947, and the Commission having duly considered said request, and being fully advised in the premises:

It Is Ordered that the time for filing additional reports of compliance pursuant to the order requiring such reports entered on September 2, 1947, be, and the same hereby is, extended for all respondents subject to such order until November 1, 1947.

By direction of the Commission:

Otis B. Johnson,
Secretary.

(Seal)

16 Exhibit D.

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 Morton Salt Co.
(Signature or name of addressee)

2. S. Thomson
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of Delivery 9-24, 1947.

(Pencil notation) 4320 Order Extending Time for Additional Report of Compliance 62 7.

Post Office Department
Official Business

Penalty for Private Use
To Avoid Payment
of Postage, $300

Postmark of Delivering Office

55 Chicago
Sep 14
8 PM
1947
Ill.

Return to Federal Trade Commission
(Name of Sender)

Street and Number,
or Post Office Box .....

Washington, D. C.

Registered Article
No. 370662
Insured Parcel

No. .....

17 **Exhibit E.**

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 Morton Salt
(Signature or name of addressee)

2 M. Nelson
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery 3-1, 1948.

(Pencil notations) 4320 Notice of Default (Morton Salt Co.) 72 11.

Post Office Department
Official Business

Penalty for Private Use
To Avoid Payment
of Postage, $300

Postmark of Delivering Office
53 Chicago Mar 1 10 PM 1948 Ill.

Return to Federal Trade Commission
(Name of Sender)

Street and Number,
or Post Office Box .....

Washington, D. C.

Registered Article
No. 370550
Insured Parcel

No. .....

18 And afterwards, on, to wit, the 26th day of May, 1948, there was filed in the Clerk's office of said Court a certain Summons With Marshal's Return Endorsed Thereon in words and figures following, to wit:

19 DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698) * *

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon Otto Kerner, Jr., U. S. Attorney, plaintiff's attorney, whose address is 450 U. S. Court House, Chicago, Ill., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Roy H. Johnson,
Clerk of Court.

By Marguerite Gilmour,
Deputy Clerk.

Date: May 18, 1948. [Seal of Court]

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Endorsed: District Court of the United States. * * (Caption—48-C-698) * * Summons In Civil Action. Returnable not later than 20 days after service. By L. M. McBride, Sec. Otto Kerner, Jr., U. S. Atty., Attorney for Plaintiff.

Return On Service Of Writ.

I hereby certify and return, that on the ____ day of _____ 19 ___, I received the within summons. Served this writ together with copy of complaint on the within named Morton Salt Company, a corporation, by delivering copies thereof to L. M. McBride, Sec., an agent of said corporation, this 19th day of May, A. D. 1948.

The president of said corporation not found in my district.

Marshal's Fees
Travel $
Service 1 $2.00

T. P. O'Donovan,
United States Marshal.
By Wm. Raff,
Deputy United States Marshal.

Subscribed and sworn to before me, a _____
this day of _____ 19 ___.
(Seal)
_____

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

20 And afterwards on, to wit, the 8th day of June, 1948, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer And Proof Of Service Of The Answer in words and figures following, to wit:

21 In the United States District Court.

* * (Caption—48-C-698) * *

ANSWER.

Now comes the Morton Salt Company, by its attorneys, L. M. McBride, E. H. Baker, Jr., Harvey Wienke and James T. Welch, and in answer to the complaint heretofore filed herein, states as follows:

1. Defendant admits all the allegations of paragraph 1 of said complaint.

2. Defendant admits all the allegations of paragraph 2 of said complaint, except that defendant states that its principal place of business is now 120 South LaSalle Street, Chicago, Illinois and not 310 South Michigan Avenue, Chicago, Illinois.

3. Defendant admits all the allegations of paragraph 3 of said complaint.

4. With respect to the allegations of paragraph 4 of said complaint, defendant admits that Exhibit "A" referred to in said paragraph and attached to said complaint is a true and complete copy of Rule XXVI of the Rules of Practice of the Federal Trade Commission; that on September 2, 1947 the Federal Trade Commission issued an order in words and figures as set forth in
22 said paragraph; that said order was purportedly issued pursuant to the provisions of said Rule XXVI and to sub-sections (a) and (b) of section 6 of the Act referred to in said paragraph; and that said Rule XXVI was purportedly promulgated under and in accordance with the provisions of sub-section (g) of section 6 of the Act referred to in said paragraph. Defendant denies that said order of September 2, 1947 was issued pursuant to the provisions of said Rule XXVI or to sub-sections (a) and (b) of section 6 of said Act, or either of them; and defendant denies that said Rule XXVI was promulgated under and in accordance with the provisions of said subsection (g) of section 6 of said Act.

5. Defendant admits all the allegations of paragraph 5 of said complaint.

6. Defendant admits all the allegations of paragraph 6 of said complaint.

7. Defendant admits all the allegations of paragraph 7 of said complaint.

8. With respect to the allegations of paragraph 8 of said complaint, defendant admits that on February 27, 1948, the Federal Trade Commission issued the notice of default set forth in said paragraph. Defendant denies all other allegations of said paragraph 8, and alleges that under date of October 31, 1947, defendant, by its attorney, filed the report required by said order of September 2, 1947, of the Federal Trade Commission, a copy of which report is attached hereto as Exhibit "A" and hereby made a part hereof, which report the Federal Trade Commission has received and retained without making any objection thereto.

9. Defendant admits all the allegations of paragraph 9 of said complaint.

23 10. Defendant denies all the allegations of paragraph 10 of said complaint.

11. Defendant denies all the allegations of paragraph 11 of said complaint.

12. Defendant alleges that said order of September 2, 1947 was issued by the Federal Trade Commission without notice to the defendant and without the defendant having been given an opportunity for any hearing with respect thereto; that this action by the Federal Trade Commission was a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States; and that, therefore, said order of September 2, 1947 is entirely null and void.

13. Defendant further alleges that under date of September 18, 1940, the Federal Trade Commission filed a complaint against certain respondents, including this defendant, in which it was alleged that respondents were engaging in acts which constituted unfair methods of competition within the intent and meaning of the Federal Trade Commission Act, all as more fully appears from the records of the Federal Trade Commission, "In the Matter of the Salt Producers Association, a corporation, et al", Docket No. 4320; that under date of November 10, 1941, the Federal Trade Commission issued its Findings as to the Facts and its Cease and Desist Order in said proceedings, in which it found the existence of and prohibited the continuance of certain acts alleged to be in violation of section 5 of the Federal Trade Commission Act; that thereafter certain of said respondents, including this defendant, filed a Petition for Review of said Cease and Desist Order with the United States Circuit Court of Appeal, for the Seventh Circuit, all as more fully appears from the records of said Court, Docket No. 7909; that thereafter on March 8, 1943, 24 the said Court issued its opinion in said review proceedings, *Salt Producers Association, a corporation, et al.* v. *Federal Trade Commission*, 134 Fed. (2d) 354, which opinion is hereby incorporated in and made a part hereof by reference; that thereafter on April 28, 1943, the said Court entered its Final Decree in said review proceedings, which said Final Decree provided as follows:

"It Is Hereby Further Ordered, Adjudged And Decreed that said modified order, in the terms above set forth, is hereby made the decree of this Court, and Petitioners are hereby commanded to obey the same, without prejudice to the right of the United States, as provided in Section 5 (1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the said

modified order to cease and desist hereby affirmed, and without prejudice to the right of the Federal Trade Commission to initiate contempt proceedings for violations of this decree.

"It Is Hereby Further Ordered, Adjudged And Decreed that within ninety (90) days after the entry of this decree, the petitioners shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied therewith.

"This Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof, and retains jurisdiction to modify the decree if changed future conditions should warrant such modification."

and that said Decree became final long prior to the commencement of the present proceedings.

14. Pursuant to the requirements of the Final Decree of the United States Circuit Court of Appeal for the Seventh Circuit, hereinabove described in paragraph 13 hereof, defendant filed its report of compliance with the Federal Trade Commision, which report the Federal Trade Commission has received and retained without making any objection thereto.

15. Defendant further alleges that said Federal Trade Commission proceedings, Docket No. 4320, were filed under Title 15 U. S. C. A. section 45, being section 5 of the Federal Trade Commission Act; that said order of September 2, 1947 of the Federal Trade Commission was entered under sub-sections 6(a) and 6(b) of said Act in connection with what purported to be an investigation of the compliance by the various respondents with said Final Decree of the United States Circuit Court of Appeal for the Seventh Circuit; and that the Federal Trade Commission is without authority or jurisdiction to proceed under sections 6(a) and 6(b) of said Act in connection with the enforcement of a decree entered under section 5 of said Act.

16. Defendant further alleges that under the terms and provisions of the Final Decree of the said United States Circuit Court of Appeal for the Seventh Circuit, said Court has retained jurisdiction over this defendant and over said proceedings, identified as Docket No. 7909 of said Court; that the Federal Trade Commission has not made application to said Circuit Court of Appeals for any order or relief

thereunder; and that this Court has no jurisdiction over the subject matter of the complaint filed herein.

17. Defendant further alleges that said order of September 2, 1947 was issued in violation of the terms and provisions of the Fourth Amendment to the Constitution of the United States in that it amounts to an illegal search and seizure of the books and records of the defendant.

18. Defendant further alleges that the things required of it by said order of September 2, 1947 do not, nor does any of them, constitute a requirement to file an annual or special report within the meaning of said section 10 of said Act for which the $100.00 per day penalty provision has been provided.

19. Defendant further alleges that the procedure sought to be pursued by the Federal Trade Commission in the
26 proceedings hereinabove referred to in this answer, are not reflected or set forth in any rule of said Federal Trade Commission; nor has such procedure been published in the Federal Register as required and provided for under the terms and provisions of section 3 of the Administrative Procedure Act, 5 U. S. C. A., sections 1001-1011; and the procedure attempted to be followed by said Federal Trade Commission as hereinabove referred to in this complaint is in violation of the terms and provisions of section 6 of said Administrative Procedure Act.

Wherefore the defendant prays that the complaint herein be dismissed and that judgment for costs be entered in favor of the defendant and against the plaintiff.

Morton Salt Company,
By L. M. McBride,
120 South LaSalle Street,
Chicago 3, Illinois.

L. M. McBride,
120 South LaSalle Street,
Chicago 3, Illinois.
Edward H. Baker, Jr.,
120 South LaSalle Street,
Chicago 3, Illinois.
Harvey Wienke,
120 South LaSalle Street,
Chicago 3, Illinois.
James T. Welch,
Bowen Building,
815 Fifteenth Street,
Washington 5, D. C.

27 State of Illinois, } ss.
County of Cook. }

Daniel Peterkin, Jr., being first duly sworn, on oath deposes and says that he is the President of the Morton Salt Company; that he makes this affidavit on behalf of the defendant in the foregoing answer; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and to those matters he believes them to be true.

Daniel Peterkin, Jr.

Subscribed and sworn to before me, Mildred Y. Cahill, a notary public in and for the County of Cook, State of Illinois, this 8th day of June, 1948.

(Seal) Mildred Y. Cahill.

My Commission Expires: Sept. 15, 1949.

28 (Exhibit "A")

McBride & Baker,
310 South Michigan Avenue,
Chicago 4, Illinois.

October 31, 1947.

Honorable Garland S. Ferguson,
Chairman,
Federal Trade Commission,
Washington 25, D. C.

Re: In the Matter of
Salt Producers Association,
et al, No. 4320.

Dear Sir:

Under date of September 2, 1947, an Order was entered in the above case "Order Requiring Additional Reports of Compliance from Certain Respondents". Among the respondents named in that Order were Morton Salt Company, Mulkey Salt Company, and Ruggles & Rademaker Salt Company, all of whom are represented by our law firm.

Since receiving copies of that Order, we have devoted a

substantial amount of time in reviewing the history of the above case, as well as in reviewing the law applicable to that case. After giving the entire matter careful consideration, we, unfortunately, cannot escape the conclusion that the Order is beyond the jurisdiction of the Federal Trade Commission. However, rather than simply ignore the Order we felt that the Commision was entitled to at least be apprised of our legal conclusions by an informal letter such as this.

We feel also that the Commission should also know that we have inquired of our clients as to their compliance with the Order of the Circuit Court of Appeals, and that as to each client, we have been advised that they have continued to comply with that original Order and with the Compliance Report initially filed by each of them in this case.

For the convenience of the Commission, we are enclosing three carbon copies of this letter.

Very truly yours,

/s/ L. M. McBride.

LMM/JC
Enc.

29 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-698) * *

PROOF OF SERVICE OF THE ANSWER.

The undersigned attorney for United States of America, plaintiff, hereby acknowledges receipt and service of a copy of the Answer of the Morton Salt Company this 8th day of June, 1948 at 2:03 o'clock p. m., Central Daylight Saving Time.

Otto Kerner, Jr.,
By E. Tillotson,
Attorney for United States of America, Plaintiff.

30 And afterwards on, to wit, the 23rd day of June, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion For Summary Judgment And Affidavit of L. M. McBride in words and figures following, to wit:

31 IN THE UNITED STATES DISTRICT COURT.
(Caption—48-C-698)

MOTION FOR SUMMARY JUDGMENT.

The defendant Morton Salt Company, a corporation, by its attorneys L. M. McBride, E. H. Baker, Jr., Harvey Wienke and James E. Welch, hereby moves the court to enter summary judgment for the defendant on the ground that there is no genuine issue as to any material fact and the defendant is entitled to a judgment as a matter of law, as more particularly appears from the Complaint, Answer and the Affidavit of L. M. McBride attached hereto as Exhibit "A", and said defendant asks such other and further relief as to the court may seem just, with defendant's costs.

Dated this 16th day of June, 1948.

Morton Salt Company,
By: L. M. McBride.

L. M. McBride,
120 South LaSalle Street,
Chicago 3, Illinois.

32 The undersigned attorney for plaintiff hereby acknowledges receipt and service of a copy of the foregoing Motion of defendant for Summary Judgment this 23 day of June, 1948, at 3:15 o'clock, P. M., Central Daylight Saving Time.

Otto Kerner, Jr.
Attorney for Plaintiff.

33 Exhibit "A".

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-698) * *

AFFIDAVIT.

L. M. McBride, being first duly sworn, on oath deposes and says that he became associated with the law firm of Stearns & Jones in June of 1934; that on January 1, 1940, he became a partner in said law firm of Stearns & Jones; that on November 30, 1940, said law firm of Stearns & Jones was dissolved, and that Edward H. Stearns and affiant on said date formed the law firm of Stearns & McBride; that in July of 1942, by reason of the death of said Edward H. Stearns said law firm of Stearns & McBride was dissolved; that thereafter until July 1, 1943, affiant conducted his law practice as a sole proprietor under the name and style of Stearns & McBride; that on July 1, 1943, affiant and Edward H. Baker, Jr., entered into a partnership for the conducting of their law practice under the name and style of Stearns & McBride; that on July 1, 1946, the name of said partnership of affiant and Edward H. Baker, Jr., was changed to McBride & Baker, with the law practice of said affiant and Edward H. Baker, Jr., having been thereafter conducted under said name and style to and including the date of this affidavit;

34. That during the entire period referred to in the preceding paragraph, the successive law firms of Stearns & Jones, Stearns & McBride, affiant doing business under the name and style of Stearns & McBride, affiant and Edward H. Baker, Jr., doing business under the name and style of Stearns & McBride, and affiant and Edward H. Baker, Jr., doing business under the name and style of McBride & Baker, successively have been general counsel for the defendant herein, Morton Salt Company; and that all the proceedings and matters referred to and described in the Complaint and the Answer heretofore filed in these proceedings, including these proceedings, have been personally handled and under the personal supervision of affiant in so far as the relationship to and participation in said proceedings and matters by Morton Salt Comapny are or have been concerned;

That, in connection with the matters alleged or referred to in the Complaint and Answer heretofore filed in these proceedings, the following are true facts within the personal knowledge of the affiant:

1. Affiant wrote and signed the letter set forth as Exhibit "A" in said Answer, and mailed the same on October 31, 1947, in an envelope addressed to the Federal Trade Commission, Washington 25, D. C., postage prepaid. Neither affiant, Morton Salt Company nor any of its officers has received any communication of any kind or description with respect to said letter from the Federal Trade Commission or from any of its agents or representatives.

2. Neither Morton Salt Company nor any of its officers or agents received any notice or other form of communication from the Federal Trade Commission or any of its agents or representatives with respect to the Order of September 2, 1947, of the Federal Trade Commission, referred to in paragraph 12 of the Answer herein, prior to the entry of said Order; and neither the Morton Salt Company nor any of its officers or agents were invited to participate in any hearing with respect to said Order of September 2, 1947, nor did any of them in fact participate in any such hearing.

3. On September 20, 1940, Morton Salt Company received by mail a document entitled "Complaint" in proceedings before the Federal Trade Commission identified as "In the Matter of Salt Producers Association, a Corporation, et al., docket No. 4320". Morton Salt Company was named as a party respondent in said document. Said document alleged among other things in the second paragraph on page 6 thereof that the acts alleged in said document "constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act"; and the third paragraph on page 6 of said document states as follows: "Whereas, The Premises Considered, the Federal Trade Commission on this 18th day of September, A. D., 1940, issues its complaint against said respondents". Said document bears what purports to be the official seal of the Federal Trade Commission and the signature of Otis B. Johnson, secretary of said Federal Trade Commission.

4. On November 10, 1941, the Federal Trade Commission in the proceedings described in the preceding para-

graph made its findings as to the facts and entered a cease and desist Order. In the first paragraph of said cease and desist Order it is stated, among other things, that "The Commission having made its findings as to the facts and its conclusion that the aforesaid respondents, * * * (referring to Morton Salt Company among others) have violated the provisions of Section 5 of the Federal Trade Commission Act."

5. Affiant, for and on behalf of Morton Salt Company, filed a Petition for Review of the above described cease and desist Order with the United States Circuit Court of Appeals, for the Seventh Circuit, which was entered as docket No. 7909 in said Court.

36 6. On April 20, 1943, said United States Circuit Court of Appeals, for the Seventh Circuit, entered its Final Decree in said review proceedings, which said Final Decree contained the provisions set forth in paragraph 13 of the Answer filed herein. No review proceedings of any kind or description were had with respect to said Final Decree referred to in this paragraph.

7. Subsequent to April 20, 1943, and within the ninety-day period specified in said Final Decree, and pursuant to said Final Decree, Morton Salt Company mailed to the Federal Trade Commission in a sealed envelope addressed to said Federal Trade Commission, Washington 25, D. C., postage prepaid, its report of compliance duly signed by the president of said Morton Salt Company, a copy of which is attached hereto and hereby made a part hereof as Exhibit "1". Neither affiant, Morton Salt Company nor any of its officers or agents has received any objection or communication from the Federal Trade Commission, its agents or representatives, with respect to said report of compliance.

8. Salt Producers Association was one of the respondents in said docket No. 4320 proceedings referred to above, and at all times since September 18, 1940, to date James B. Wescott of the law firm of Miller, Gorham, Wescott & Adams, One North LaSalle Street, Chicago, Illinois, was the general counsel for said Salt Producers Association, and has during all the time mentioned in the Complaint and the Answer filed herein and in this affidavit represented said Salt Producers Association in all the proceedings referred to in said Complaint, Answer and affidavit. Attached hereto and hereby made a part hereof as

Exhibit "2" is a true and correct copy of a letter received by said James B. Wescott, the original of which letter has been examined by affiant and is in the files of said James B. Wescott.

9. Neither affiant, Morton Salt Company, nor its officers or agents has received any notice or other communi-
37 cation from the Federal Trade Commission, or otherwise, with respect to or concerning any application by the Federal Trade Commission to the United States Circuit Court of Appeals, for the Seventh Circuit, for any proceedings, order or relief under, pursuant to or in connection with the said Final Decree of said Circuit Court of Appeals with respect to the Morton Salt Company, either in regard to the enforcement of said Final Decree or otherwise.

10. Affiant has examined all the various releases of the Federal Trade Commission as to what it has published in the Federal Register as required and provided for under the terms and provisions of Section 3 of the Administrative Procedure Act, 5 USCA, Sections 1001-1011; and affiant has found no rule or other procedural provision in said releases specifically providing for the procedure adopted by the Federal Trade Commission as outlined in the Complaint filed herein and as sought to be enforced in the proceedings before this Court.

L. M. McBride.

Subscribed and sworn to before me this 16th day of June, 1948.

Lois E. Jesiek,
(Seal.) *Notary Public.*

My Commission Expires: July 22, 1950.

38 Exhibit "1".

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of
Salt Producers Association, et al. } Docket No. 4320.

REPORT OF MORTON SALT COMPANY, A CORPORATION, AND RUGGLES & RADEMAKER SALT COMPANY, A CORPORATION, TWO OF THE RESPONDENTS HEREIN, AS TO COMPLIANCE WITH ORDER TO CEASE AND DESIST.

On April 20, 1943, the United States Circuit Court of Appeals for the Seventh Circuit, in Case No. 7909, entered a final decree affirming and enforcing a modified order to cease and desist against the Respondents in the above entitled cause, including the Respondents, Morton Salt Company and Ruggles & Rademaker Salt Company. In the next to the last paragraph of said final decree, these Respondents were ordered to file with the Federal Trade Commission, within ninety (90) days after the entry of said final decree, a report, in writing, setting forth in detail the manner and form in which these Respondents have complied with said final decree.

Now, therefore, these Respondents, pursuant to the terms and provisions of said final decree, do hereby submit their report as to the manner and form in which
39 they have complied with said final decree:

1. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now a party to and will not hereafter become a party to, and is not now continuing, carrying out, directing, instigating or co-operating in and will not hereafter carry out, direct, instigate or co-operate in any planned common course of action, mutual agreement, combination or conspiracy to fix or maintain the prices of salt or to curtail, restrict or regulate the production or sale of salt; except that both of these Respondents are parties to and will hereafter become parties to mutual agreements between them-

selves and their respective customers for the purpose of fixing the prices at which salt is to be sold from time to time by these Respondents to their respective customers.

2. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now establishing, fixing or maintaining and will not hereafter establish, fix or maintain, in any manner whatsoever, uniform prices, terms and conditions of sale upon which salt is being sold or is to be sold, for the purpose of carrying out or pursuant to any planned or agreed common course of action referred to in paragraph 1 hereof; except that each of these Respondents is a party to and will hereafter become a party to mutual agreements with their respective customers for the purpose of establishing
40 prices, terms and conditions of sale upon which salt is to be sold by each Respondent to its respective customers.

3. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now adhering to, or promising to adhere to, and will not hereafter adhere to, or promise to adhere to, filed or published prices or terms and conditions of sale for salt pending the filing of changes therein with the Salt Producers Association, or with any other agency, or with any other respondent to the above entitled cause, for the purpose of carrying out or pursuant to any planned or agreed common course of action referred to in paragraph 1 hereof.

4. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now continuing the delivered price zones heretofore used for making quotations and sales of salt, and will not hereafter establish or maintain any delivered price zones which are similar to those heretofore used, for the purpose of carrying out or pursuant to any planned or agreed common course of action referred to in paragraph 1 hereof. However, each of these Respondents is now pursuing and may hereafter pursue the following sales practices and policies:

(a) Each of these Respondents is now employing
41 and may hereafter employ delivered price zones for certain of its products, and in each of said delivered price zones the delivered price of each such product will be the same to all customers of each Respondent throughout such zone, regardless of the differing costs of delivery of the product between the plants of such Respondent and

its customers within each such zone. As to all delivered price zones now employed or which may hereafter be employed by either of these Respondents, the boundaries of those delivered price zones, the products to be sold on a uniform delivered price basis to all customers of each Respondent throughout each such delivered price zone and the delivered prices at which each of those products is to be sold in each such delivered price zone is now being and will hereafter be determined by each Respondent as a factor of and consistent with its own sales policies and not as a part of any planned common course of action, mutual agreement, combination or conspiracy between such Respondent and any other Respondent to the above entitled cause.

(b) When any other Respondent is selling or offering for sale on a delivered price basis or otherwise, any product competitive with or similar to any product of either Respondent which is sold or offered for sale in the manner described in paragraph 4 (a) hereof, and the sale or offering price of such competitive or similar product is
42 equal to, substantially equal to or less than the sale or offering price of said product of either of these Respondents, then either of these Respondents, within such geographical territory or territories as it may deem necessary or advisable, may reduce the delivered price of its said product to such extent as is necessary to maintain its competitive position.

(c) As to all products of either of these Respondents not quoted on a delivered price basis, as described in paragraphs 4(a) and 4(b) hereof, the price is f. o. b. a plant of such Respondent, and the transportation charges and all applicable excise taxes are for the account of the customer. The f. o. b. plant price, plus full transportation charges established by the Interstate Commerce Commission, plus any applicable service or warehousing charges and plus any applicable excise tax, equal the delivered cost to the customer. When any other Respondent is selling or offering for sale at any given destination, a product competitive with or similar to a product of either of these Respondents also sold or offered for sale at such destination, and the price or delivered cost to the customer of such competitive or similar product is equal to, substantially equal to or less than the customer's delivered

cost of said product of either of these Respondents, then either of these Respondents may reduce the f. o. b. plant price of such product to such extent as is necessary
43 to maintain its competitive position.

5. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now exchanging and will not hereafter exchange, directly or through the Salt Producers Association, or any other agency or clearing house, price lists, invoices and other records of sale showing the quality, current prices and terms and conditions of sale allowed by either of these Respondents to dealers and distributors, for the purpose of carrying out or pursuant to any planned or agreed common cause of action referred to in paragraph 1 hereof, or for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt; but each of these Respondents is now a party to and may hereafter become a party to arrangements for the collection and dissemination by and through the Salt Producers Association of figures and statistics, showing the total volume of sales of salt without disclosing the sales volume of either of these or any other individual producer of salt.

6. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now exchanging and will not hereafter exchange, directly or through the medium of the Salt Producers Association, or any other agency, the names of dealers or distributors who receive special discounts, for the purpose of carrying out or
44 pursuant to any planned or agreed common course of action referred to in paragraph 1 hereof, or for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt.

7. Except as hereinafter set forth in paragraphs 9 and 10 hereof, neither of these Respondents is now curtailing, restricting or regulating and will not hereafter curtail, restrict or regulate the quantity of salt to be produced and sold by either of these Respondents and the other Respondents in the above entitled cause, by any method or means during any given period of time, for the purpose of carrying out or pursuant to any planned or agreed common course of action referred to in paragraph 1 hereof, or for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt.

8. Neither of these Respondents is now doing or causing to be done and will not hereafter do or cause to be done, any of the things forbidden by said final decree through the medium of Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson or D. M. Metzger, or any other corporation, firm or individual.

9. Both of these Respondents are now parties to and may hereafter become parties to contracts and agreements relating to the maintenance of resale prices as are not
45 prohibited by the provisions of an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (The Sherman Act), as amended.

10. The Respondent, Ruggles & Rademaker Salt Company, is a wholly owned subsidiary corporation of the Respondent, Morton Salt Company. In addition to Ruggles & Rademaker Salt Company, the Morton Salt Company has other wholly owned subsidiary corporations. The Morton Salt Company, the Ruggles & Rademaker Salt Company, and the other wholly owned subsidiary corporations of the Morton Salt Company, are now parties to and, together with any additional subsidiary corporations hereafter organized or acquired, will hereafter continue to be and become parties to planned common courses of action and mutual agreements by and between themselves alone, to fix and maintain the prices of salt sold by the Morton Salt Company and said subsidiary corporations and to curtail, restrict and regulate the production or sale of salt by the Morton Salt Company and said subsidiary corporations, for the sole purpose of effecting and carrying out the mutual sales and production policies between said Morton Salt Company and said subsidiary corporations; and, notwithstanding the terms and provisions of said final decree, the Morton Salt Company
46 and said subsidiary corporation, as between themselves alone and solely for the purpose of effecting the policies of the affiliated group, are doing and will hereafter do some or all the acts otherwise prohibited in said final decree insofar as the relationship of these Respondents and any other Respondent or party not a member of the affiliated group is concerned.

11. These Respondents have in all respects fully complied with said final decree and will hereafter continue so to do.

Respectfully submitted this 23rd day of June, 1943.

Morton Salt Company, a corporation,
By: Daniel Peterkin, Jr.,
Its President.
310 South Michigan Avenue,
Chicago, Illinois.

Ruggles & Rademaker Salt Company,
a corporation,
By: Daniel Peterkin, Jr.,
Its President.
310 South Michigan Avenue,
Chicago, Illinois.

Attorneys for Respondents:
Stearns & McBride,
310 South Michigan Avenue,
Chicago, Illinois,
By: L. M. McBride.

47 EXHIBIT "2".

FEDERAL TRADE COMMISSION.

Washington 25.

Office of General Counsel.

February 17, 1948.

James B. Wescott, Esq.,
Miller, Gorham, Wescott & Adams,
One North LaSalle Street,
Chicago 2, Illinois.

Re: Docket No. 4320
Salt Producers Association, et al.

Dear Mr. Wescott:

Your letter of February 16, 1948, is received and contents noted. With respect to your statement that you understood my position on the recent trip to Detroit to be that the inquiry conducted by Mr. Truly and myself might be related either to Docket No. 4320 or to a new investigation under Section 5, I have no recollection that there was any doubt but that the inquiry and request for information from Salt Producers Association was related to the proceeding in Docket No. 4320. As you yourself note, the letter of the Secretary of the Commission under date of January 26, 1948, made it perfectly clear that this was the purpose of the inquiry.

With regard to your request for my ideas on your suggestion that further action in this matter be deferred until after the decision of the Supreme Court in the Cement case; I fail to see that anything the Court might hold in the Cement case would affect or be relevant to the question of whether or not the respondents in Docket No. 4320 have been and are now complying with the Commission's order and to cease and desist and the decree of the Circuit Court of Appeals.

Very truly yours,

(s) Jos. S. Wright,
Joseph S. Wright,
Chief, Division of Compliance.

48 And afterwards on, to wit, the 24th day of June, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice and Motion in words and figures following, to wit:

49 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *.

NOTICE.

Please take notice that on the 24th day of June, 1948, at the opening of Court in the forenoon or as soon thereafter as counsel can be heard, we will appear before the Honorable Philip Sullivan, in the room usually occupied by him as a court room in the Federal Building, and then and there move the Court for an order in accordance with the motion herewith served upon you, at which time you may appear if you see fit.

Harvey Wienke,
Attorney for Defendant.

The undersigned attorney for the plaintiff hereby acknowledges receipt and service of a copy of the foregoing notice and a copy of the motion mentioned therein this 23 day of June, 1948, at 3:15 o'clock P. M., Central Daylight Saving Time.

Otto Kerner, Jr.,
Attorney for Plaintiff.

50 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *

MOTION.

The defendant Morton Salt Company, a corporation, by its attorneys L. M. McBride, E. H. Baker, Jr., Harvey Wienke and James T. Welch hereby moves the Court to enter an order extending the time for the filing of defendant's brief in support of its motion for summary judgment heretofore filed herein.

Dated this 24th day of June, 1948.

Harvey Wienke.

Harvey Wienke,
120 South La Salle Street,
Chicago 3, Illinois.

51 And on the same day to wit, the 24th day of June, 1948 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

52 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *

STIPULATION.

It is hereby stipulated by and between the parties, through their respective attorneys, that the time within which Defendant may file a brief in support of its Motion for Summary Judgment is extended to and including July 15, 1948.

Dated June 23, 1948.

Otto Kerner, Jr.,
United States District Attorney
Attorney for Plaintiff.
Harvey Wienke,
Attorney for Defendant.

53 And on the same day to wit, on the 24th day of June, 1948, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

54 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *

ORDER.

This cause coming on to be heard on motion of Morton Salt Company, a corporation, defendant in the above entitled cause, by its attorneys L. M. McBride, E. H. Baker, Jr., Harvey Wienke and James T. Welch, and the Court being fully advised in the premises:

It is hereby ordered that the time within which the defendant shall file its brief in support of its motion for summary judgment, heretofore filed in this cause on June 23,

1948, shall be extended to and including the 15th day of July, 1948.

Entered this 24th day of June, 1948.

Philip L. Sullivan,
Judge.

55 And afterwards on, to wit, the 15th day of July, 1948 came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Two (2) Notices and Motion for Summary Judgment, Affidavit of Otis B. Johnson and Exhibit A, Pages 1, 2, 3 and 4, in words and figures following, to wit:

56 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698) * *

NOTICE.

To: L. M. McBride, Esq.,
120 South La Salle Street,
Chicago 3, Illinois.

Please Take Notice that on Thursday, July 15, 1948, at the hour of ten o'clock a. m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Michael L. Igoe, Judge of the District Court of the United States, or before such other judge as may be sitting in his place and stead, in the courtroom usually occupied by him in the United States Court House at Chicago, Illinois, and then and there pray the entry of an order granting the Government leave to file a Consolidated Brief in support of its Motion for Summary Judgment heretofore filed, and further pray the entry of an order extending the Government's time to answer the respondent's Brief filed this day to include the date of August 9, 1948; at which time and place you may appear if you so deem fit.

Otto Kerner, Jr.,
United States Attorney.

Received a copy of the above and foregoing Notice this 14th day of July, A. D. 1948.

L. M. McBride,
Attorney for Defendant.

57 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-698) * *

NOTICE.

To: L. M. McBride, Esq.,
120 South LaSalle Street,
Chicago 3, Illinois.

Dear Sir:

Please Take Notice that the attached motion for summary judgment, with supporting affidavit, is being this day filed with the Clerk of the United States District Court for the Northern District of Illinois, at the United States Courthouse, Chicago, Illinois, and will be brought on for hearing before the Court as soon as counsel can be heard.

Dated this 15th day of July, 1948.

United States of America,
By Otto Kerner, Jr.,
United States Attorney,
Chicago, Illinois.

Receipt of a copy of the above notice and a copy of a motion for summary judgment with supporting affidavit annexed thereto is hereby acknowledged this 14 day of July, 1948.

L. M. McBride,
By Harvey Wienke,
Attorney for Defendant.

58 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-698) * *

MOTION FOR SUMMARY JUDGMENT.

United States of America, plaintiff, by its attorneys, acting pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves this Court for a summary judgment in favor of the plaintiff on the ground that the complaint, the answer of the defendant, Morton Salt Company, and the affidavit attached to this motion establish that there is no genuine issue as to any material fact, and that on the undisputed facts the plaintiff is entitled as a matter of law to the judgment and to the relief demanded in the complaint and for which it moves herein.

In support of this motion, the affidavit of Otis B. Johnson is attached hereto.

United States of America,
By Otto Kerner, Jr.,
United States Attorney,
Chicago, Illinois.

J. Stephen Doyle, Jr.,
Special Assistant to the Attorney General,
United States Department of Justice,
Washington, D. C.

Joseph S. Wright,
Assistant General Counsel,
Federal Trade Commission,
Washington, D. C.

J. B. Truly,
Special Attorney,
Federal Trade Commission,
Washington, D. C.

59 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-698) * *

AFFIDAVIT.

District of Columbia, City of Washington. } ss.

Otis B. Johnson, being first duly sworn, deposes and says that he is the Secretary of the Federal Trade Commission; that he makes this affidavit on personal knowledge; that the Federal Trade Commission, on August 10, 1943, issued its modified order to cease and desist in a proceeding before the Commission entitled In the Matter of Salt Producers Association, a corporation, et al., Commission Docket Number 4320; that the defendant herein, Morton Salt Company, was one of the respondents before the Commission against whom that modified order to cease and desist was issued; that the said modified order to cease and desist was served on the said Morton Salt Company by registered mail on August 12, 1943; that a true and complete copy of the said modified order to cease and desist is attached to this affidavit as Exhibit A and is made a part hereof; that nine of the corporations named in the Commission's order dated September 2, 1947, which order is copied in full in paragraph 4 of the complaint herein, have complied with that order by filing the special reports required thereby.

Otis B. Johnson.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 13th day of July, 1948.

Denis E. Connell,
Notary Public.

(Notarial Seal)

My commission expires March 11, 1951.

60

EXHIBIT A.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 10th day of August, A. D. 1943.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

In the Matter of Salt Producers Association, a corporation; Avery Salt Company; Barton Salt Company; Carey Salt Company; Cayuga Rock Salt Company; Colonial Salt Company; Detroit Rock Salt Company; Diamond Crystal Salt Company, Inc.; International Salt Company; Jefferson Island Salt Company, Inc.; Hardy Salt Company; Morton Salt Company; Myles Salt Company, Ltd.; Mulkey Salt Company; Ohio Salt Company; Ruggles & Rademaker Salt Company; Saginaw Salt Products Company; Union Salt Company; Watkins Salt Company; Worcester Salt Company; American Salt Corporation; and Stevenson Corporation, a corporation, and its officers, Charles R. Stevenson, T. M. Harrison, C. H. Ferris, N. M. Perris, E. G. Ackerman, A. H. Dyer, R. E. Case, F. L. Sweetser, W. R. Guthrie, A. P. Monweiler, S. M. Hudson, R. R. Bliss, L. B. Platt, Howard Marvin and D. M. Metzger, a partnership, doing business under the firm name of Stevenson, Jordan and Harrison.	Docket No. 4320

MODIFIED ORDER TO CEASE AND DESIST.

This proceeding coming on for further hearing before the Federal Trade Commission, and it appearing that

61 on November 10, 1941, the Commission made its findings as to the facts herein and concluded therefrom that respondents had violated the provisions of the Federal Trade Commission Act, and issued and subsequently served upon them its order to cease and desist; and it further appearing that respondents on January 9, 1942, filed in the United States Circuit Court of Appeals for the Seventh Circuit petition to review and set aside the Commission's order, and that on March 8, 1943, the said court rendered its opinion and on April 20, 1943, issued its decree modifying the aforesaid order of the Commission in certain particulars and affirming the order in other particulars:

Now, Therefore, pursuant to the provisions of Subsection (i) of Section 5 of the Federal Trade Commission Act, the Commission issues this its modified order to cease and desist in conformity with said decree:

It Is Ordered that the respondents Salt Producers Association, a corporation, Avery Salt Company, a corporation, Barton Salt Company, a corporation, The Carey Salt Company, a corporation, Cayuga Rock Salt Company, a corporation, Colonial Salt Company, a corporation, Detroit Rock Salt Company, a corporation, Diamond Crystal Salt Co. Inc., a corporation, International Salt Company, a corporation, Jefferson Island Salt Company, Inc., a corporation, Hardy Salt Company, a corporation, Morton Salt Company, a corporation, Myles Salt Company, Ltd., a corporation, Mulkey Salt Company, a corporation, Ohio Salt Company, a corporation, Ruggles & Rademaker Salt Company, a corporation, Saginaw Salt Products Company, a corporation, Union Salt Company, a corporation, Watkins Salt Company, a corporation, Worcester Salt Company, a corporation, American Salt Corporation, a corporation, their officers, servants, agents, and employees, and Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson and D. M. Metzger, respectively president and treasurer of said Stevenson, Jordan and Harrison, Inc., and their agents, servants, and employees, or any two or more of said respondents, with or without the cooperation of others not parties hereto, in connection with the offering for sale, sale, and distribution of salt in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, or carrying out, or directing, instigating, or cooperating in, any planned common course of action, mutual agreement,

combination, or conspiracy, to fix or maintain the prices of salt or curtail, restrict or regulate the production or sale thereof, and from doing any of the following acts or things pursuant to any such planned or agreed common course of action:

62 (1) Establishing or maintaining uniform prices for salt, or uniform terms and conditions in the sale thereof, or in any manner agreeing upon, fixing, or maintaining any prices, including terms and conditions of sale, at which salt is to be sold;

(2) Adhering, or promising to adhere, to filed or published prices or terms and conditions of sale for salt pending the filing of changes therein with the Salt Producers Association, or with any other agency, or with each other;

(3) Continuing the delivered price zones heretofore used for making quotations and sales of salt, or establishing or maintaining any delivered price zones which are similar to those heretofore used in that their use would result as heretofore in making the delivered prices of the respective corporations identical despite their different costs of delivery;

(4) Exchanging, directly or through the Salt Producers Association, or any other agency or clearing house, price lists, invoices, and other records of sale showing the quantity, current prices and terms and conditions of sale allowed by said corporations to dealers and distributors; provided, however, that nothing herein shall prevent said association from collecting and disseminating to the respective manufacturers figures showing the total volume of sales of salt without disclosing the sales volume of individual producers, for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(5) Exchanging, directly or through the medium of the Salt Producers Association, or any other agency, the names of distributors or dealers who receive special discounts; for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(6) Curtailing, restricting, or regulating the quantity of salt to be produced and sold by said corporations by any method or means during any given period of time for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

63 (7) Doing, or causing to be done, any of the things forbidden by this order through the medium of said

Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson or D. M. Metzger, or any other corporation, firm or individual.

It Is Further Ordered that Stevenson, Jordan and Harrison, Inc., and Charles R. Stevenson and D. M. Metzger as officers thereof, and their agents, servants, and employees, do forthwith cease and desist from doing or performing any of the things forbidden by this order, or aiding, assisting, or cooperating in the performance thereof.

It Is Further Ordered that nothing in this order is to be construed as prohibiting the respondents from entering into such contracts or agreements relating to the maintenance of resale prices as are not prohibited by the provisions of an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (the Sherman Act), as amended.

It Is Further Ordered that for the reasons appearing in the findings as to the facts the complaint herein be, and hereby is, dismissed as to the following respondents: T. M. Harrison, C. H. Ferris, N. M. Perris, E. G. Ackerman, A. H. Dyer, R. E. Case, F. L. Sweetser, W. R. Guthrie, A. P. Nonweiler, S. M. Hudson, R. R. Bliss, L. B. Platt, and Howard Marvin.

By the Commission.

Otis B. Johnson,
Secretary.

64 And on the same day, to wit, on the 15th day of July, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

65 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698) * *

On motion of the plaintiff by the United States Attorney it is

Ordered that leave be and it is hereby granted to the plaintiff to file a consolidated brief herein and that the time within which to file answer to the defendant's brief be and it is hereby extended to and including August 9, 1948.

66 And afterwards on, to wit, the 27th day of July, 1948 came the Defendant and parties, respectively by their attorneys and filed in the Clerk's office of said Court their certain Motion To Extend Time To File Defendant's Answering Brief And Stipulation To Extend Time To File Defendant's Answering Brief in words and figures following, to wit:

67 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698) * *

MOTION TO EXTEND TIME TO FILE DEFENDANT'S ANSWERING BRIEF.

The defendant Morton Salt Company, a corporation, by its attorneys L. M. McBride, E. H. Baker, Jr., Harvey Wienke and James T. Welch hereby moves the Court to enter an order extending the time for the filing of defendant's brief in answer to plaintiff's brief in support of plaintiff's motion for summary judgment to and including August 9, 1948; and the defendant further says that the plaintiff has consented to the entry of this order as evidenced by the stipulation hereto attached and made a part hereof.

Dated July 26, 1948.

Harvey Wienke,
Attorney for Morton Salt Company.

Harvey Wienke,
120 South LaSalle Street,
Chicago 3, Illinois.

68 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *

STIPULATION TO EXTEND TIME TO FILE DEFENDANT'S ANSWERING BRIEF.

It is hereby stipulated by and between the parties, through their respective attorneys, that the time within which Defendant may file its brief in answer to Plaintiff's brief in support of Plaintiff's Motion for Summary Judgment is extended to and including August 9, 1948; and it is further stipulated that an order may be entered in accordance herewith without further notice.

Dated July 26, 1948.

Otto Kerner, Jr.,
United States District Attorney,
Attorney for Plaintiff.
Harvey Wienke,
Attorney for Defendant.

69 And on the same day to wit, on the 27th day of July, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

70 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—48-C-698) * *

On stipulation of the parties by counsel filed herein it is Ordered that the time of the defendant within which to file answering berief in re plaintiff's motion for a summary judgment be and it is hereby extended to August 9, 1948.

71 And afterwards on, to wit, the 19th day of August, 1948 there was filed in the Clerk's office of said Court a certain Memorandum Of The Honorable Philip L. Sullivan, District Judge, in words and figures following, to wit:

72 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Captions—48-C-698-699) * *

MEMORANDUM.

These actions are before the Court upon complaint filed by the United States which seek the enforcement of an order of the Federal Trade Commission dated September 2, 1947, requiring the defendants, and other corporations named in that order, to file special reports with the Federal Trade Commission within thirty days from the date of service. The complaint also seeks judgment against defendants for forfeiture in the sum of $100.00 per day for each day from and after April 1, 1948, that defendants have failed to file with the Federal Trade Commission the reports required by the order of September 2, 1947.

Each defendant has answered and filed a motion for summary judgment. The Government also has filed
73 its motion for summary judgment. All parties are agreed that there is no genuine issue as to any material fact involved in the case.

Since the issues of law raised by the pleadings in the two actions are identical, the Court is considering both cases as one.

The suits grow out of the order of the Federal Trade Commision dated September 2, 1947, requiring these two defendants among others to file special reports with the Commission, the order reciting that it was issued in the public interest pursuant to the authority granted the Commission by subsections (a) and (b) of Section 6 of the Federal Trade Commission Act, and pursuant to Rule XXVI of the Commission's Rules promulgated under subsection (g) of Section 6, claimed to implement the authority granted the Commission by subsection 6(b) "To require, by general or special orders, corporations engaged in commerce * * * to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to

specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in
74 writing "The default order of February 27, 1948, charging that defendants had failed to comply with the order of September 2, 1947, then followed.

Jurisdiction is founded on Section 9 of the Act which vests this Court with jurisdiction to command corporations to comply with any order of the Commission made pursuant to the Act, and on Section 10 which vests this Court with jurisdiction of suits of the United States for the recovery of forfeitures if corporations fail to file required reports within the time fixed by the Commission for filing the same.

Defendants in their answers have set out certain matters relating to a prior proceeding against them by the Commission under Section 5 of the Act, and it is agreed by both sides that the facts therein are as follows:

The Commission on September 18, 1940, issued its complaint under Section 5 of the Act charging defendants, and others, with engaging in an unlawful conspiracy to fix prices on, and to control the production of salt in connection with the sale and distribution of that commodity in interstate commerce. Answers were filed by the defendants therein admitting the alleged conspiracy. On November 10, 1941, the Commission issued its order to cease and desist, requiring the defendants to discontinue the conspiracy alleged in the complaint and admitted in the answers. A petition for review of the Commission's
75 order was filed by the defendants in the Circuit Court of Appeals for the Seventh Circuit, which court rendered its opinion on March 8, 1943, reported as *Salt Producers Association* v. *Federal Trade Commission*, 134 Fed.(2) 354. On April 20, 1945, the Circuit Court of Appeals entered its decree modifying the Commission's order in certain respects, affirming it as modified and directing compliance therewith. On August 10, 1943, the Commission issued its modified order to cease and desist, as required by Section 5(i) of the Act, incorporating the changes directed by the Circuit Court of Appeals, and caused the same to be served on all of the defendants. In August, 1943, the respondents named in the decree of the Circuit Court of Appeals filed reports with the Commission

showing the manner and form in which they were complying with the court's decree.

On September 2, 1947, the Commission alleges that it believed it was in the public interest to make a further investigation of the manner and form of compliance, and in aid of that investigation, pursuant to Section 6(a) and 6(b) of the Act in aid of enforcement proceedings in Docket No. 4320 under Section 5 of the Act and pursuant to the Commission's Rule XXVI, issued its order requiring the defendants and others to file special compliance reports with the Commission within thirty days from the date of service, which was had on September 4, 1947. Later
76 the Commission by letter order extended the time until November 1, 1947. The Government urges that the reports were not filed and that separate notices of default, as it insists is provided for in Section 10 of the Act, as a prerequisite to subjecting defendants to the $100.00 a day forfeiture for failure to file, were issued by the Commission on February 27, 1948, and served on each defendant on March 1, 1948. The Commission alleges that the thirty days specified in Section 10 and in the notices expired on April 1, 1948, and insists that defendants' failure to file the required reports continued, and that each defendant notified the Commission in writing that it would not comply with the order, and therefore these suits were filed to compel them to do so and to obtain judgment in favor of the United States for $100.00 per day from each for each day they are in default.

In their answers the defendants set out that pursuant to the requirements of the final decree of the United States Circuit Court of Appeals for the Seventh Circuit, defendants filed their reports of compliance with the Federal Trade Commission, and that the Commission received said reports without making any objection thereto. That the order of September 2, 1947, does not require them to file an annual or special report within the meaning of
77 Section 10 of said Act. That the procedure sought to be pursued by the Federal Trade Commission is not reflected or set forth in any Rule of said Federal Trade Commission, and has not been published in the Federal Register, as required by Section 3 of the Administrative Procedure Act, and that pursuant to the order of September 2, 1947, each defendant has filed an additional compliance report, by stating that it is complying in the same manner set out in its original compliance report.

The Commission insists that the present suits in this court have nothing whatsoever to do with the prior proceeding under Section 5 of the Act, except insofar as the Commission's authority to investigate compliance with the decree and modified order to cease and desist have been questioned. The Commission insists that these suits are not for the purpose of enforcing compliance with the decree of the Circuit Court of Appeals or the Commission's modified order to cease and desist, nor have the defendants been charged with a violation of that decree or modified order. That the Commission is only seeking by an investigatory process authorized by law, to obtain the facts as to the manner and form in which defendants have complied with that decree and modified order.

Defendants urge that there is no published rule or statement of procedure of the Commission which specifies,
78 outlines or even refers to the use of Sections 6(a) and 6(b) or Section 10 of the Federal Trade Commission Act in aid of decrees entered under Section 5 of the Act, nor is there any reference in the Commission's Rules and Statements of Procedure to the procedure followed in the present proceedings. The former proceedings referred to as Docket No. 4320 when the matter was before the Federal Trade Commission, and as Case No. 7909 when it was in the Circuit Court of Appeals, were brought by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, and when the matter was on appeal before the Circuit Court of Appeals, that court, in its decree, reserved "jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof. * * *"

Section 5 of the Federal Trade Commission Act itself provides for enforcement proceedings with respect to decrees entered thereunder, and subsection (1) thereof reads:

> "(1) Any person, partnership or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

79 A careful reading of the legislative history of the Act shows that Section 6 is only to be invoked in support of general economic surveys and not in aid of enforcement proceedings under a Section 5 decree. The Section 10 penalty provisions, on which the present proceeding is based, can be invoked only in connection with general economic survey proceeding under Section 6, and not in connection with enforcement proceedings under Section 5.

Where an appeal has been taken to the Circuit Court of Appeals, as was done in Docket No. 4320, Section 5 gives to the Circuit Court of Appeals sole jurisdiction of enforcement proceedings thereunder, and that court in order to enforce compliance with its decree specifically reserved jurisdiction of the cause, subject only to the Commission's right to pursue contempt proceedings in the Circuit Court of Appeals, or to collect the civil penalty provided by Section 5(1).

The Commission's order of September 2, 1947, here involved, required these defendants to "file additional reports showing in detail the manner and form in which it has been and is now complying with said modified order to cease and desist." On October 31, 1947, these defendants advised the Commission in writing that they were complying in the same manner as set forth in their original compliance reports filed in 1943, to which original reports
80 no objection had ever been made by the Commission.

The September 2, 1947 order also required the defendants, as a part of their additional reports, to submit a complete statement "of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944."

Sections 6(a) and 6(b) provide for economic reports. Section 6(a) provides: "That the Commission shall also have power

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relations to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, cor-

porations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or an-
81 swers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

A reading of the legislative history of Sections 6(a) and 6(b) convinces me that these sections are designed for the purpose of compelling corporations to make annual reports, and giving the Commission authority within its discretion to require special reports when it deemed that advisable, but is not related in any way to the enforcement of the law. The Federal Trade Commission Act, Section 10, provides that corporations shall be subject to the forfeiture of $100.00 a day only for failure to file annual reports and special reports when required by the Commission, in conformity with Section 6, but has no relation to the jurisdiction conferred by Section 5. At least two courts have in effect specifically denied the existence of any relationship between Section 5 and Section 6 of the Act. *Federal Trade Commission* v. *Miller's National Federation*, 47 Fed. (2) 428, where the court said:

> "The power of investigation conferred upon the Commission by Section 6 is different in character from the jurisdiction conferred by Section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation."

And in *Federal Trade Commission* v. *Claire Furnace*
82 *Co.*, 274 U. S. 160, where the Supreme Court makes the same distinction, quoted in this memorandum *infra*.

When Congress enacted the Federal Trade Commission Act the duties and powers of the new Commission seem to have been divided into two categories. The first category continued the power of investigation and publicity with respect to corporations formerly lodged in its predecessor, the Bureau of Corporations, and now contained in Sections 6(a) and 6(b) of the present Act. However, Congress added a new section, Section 10 providing for a forfeiture of $100.00 a day for failure to file the reports provided for in Sections 6(a) and 6(b). The second category into which the duties of the Federal Trade Commission were divided was provided by Section 5 which prohibits unfair methods of competition and provides the method for its enforcement and penalties. Subsection (a) of Section 5 provides that unfair methods of competition in commerce and unfair and deceptive acts or practices in commerce are declared to be unlawful, and also provides that the Commission has power to prevent the use of such unfair methods. Subsection (b) sets out the jurisdiction and procedure by which the Commission may prosecute acts involving unfair methods of competition. Subsection (c) provides the appellate procedure available to respondents against whom a cease and desist order has been entered.
83 Subsection (d) provides that "The jurisdiction of the Circuit Court of Appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive." Subsections (g), (h), (i) and (j) set out the points of time at which a cease and desist order of the Commission becomes final.

I find nothing in Section 5 which gives the Commission power to modify or attempt to enforce, independently of the Circuit Court of Appeals, its original cease and desist order of 1943. Section 5 of the Federal Trade Commission Act is self-sufficient for enforcement proceedings with respect to decrees entered thereunder, and therefore the remedies available to the Commission are contempt proceedings in the Circuit Court of Appeals or penalty proceedings under Section 5(1) of the Act.

The United States contends that the Commission's order of September 2, 1947 indicates that the purpose of the Commission's investigation was to determine the manner and form of compliance with the Commission's modified order to cease and desist of November 10, 1941. That the Commission's order of September 2,

1947 only asked that the defendants file reports indicating the manner and form of defendants' compliance with
84 the modified order of the Commission to cease and desist and with the decree of the Circuit Court of Appeals. Defendants did file an additional compliance report with the Commission setting out that they were complying in the same manner as set forth in their original compliance reports filed in 1943. What defendants did not file is the documentary evidence requested by the Commission and not covered by Section 10 at all. Section 10 provides that only upon the failure of a corporation to file the annual or special reports referred to therein shall the penalty provision become operative. *United States* v. *National Biscuit Company*, 25 Fed. Supp. 329.

Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160, was a bill in equity brought by various coal, steel and related industries to enjoin the Federal Trade Commission from enforcing order issued by the Commission requiring those companies to furnish monthly reports of production, balance sheets and other voluminous information in detail. Without questioning appellee's right to seek relief by injunction, the Federal Trade Commission answered, admitting the issuance of the orders, claiming authority therefor under Section 6, and 9, Federal Trade Commission Act. The cause was heard on a motion to strike the answer, the court holding the answer insufficient, and granted the injunction. The Supreme Court said:

85 "Appellees were not charged with practicing unfair methods of competition (Section 5, Act of September 26, 1914) or violating the Clayton Act * * *. Orders under such charges can be enforced only through a Circuit Court of Appeals * * *.

"The action of the Commission here challenged must be justified, if at all, under the paragraphs of Sections 6 and 9, * * * and the only methods prescribed for enforcing orders permitted by any of these paragraphs are specified in Sections 9 and 10. They are applications to the Attorney General to institute an action for mandamus, and proceedings by him to recover the prescribed penalties."

Sections 6(a) and 6(b) of the Act provide for economic investigations by the Commission from time to time as to the organization, business, conduct, practice and management

of any corporation engaged in commerce, and for the filing of annual or special reports. The penalty applicable for failure to file these reports has no relation to failure to comply with an order requiring information as to the manner in which an order to cease and desist is being observed, and the supplemental compliance report here involved is not one required by the Act and is clearly not the kind of report set out in Section 6(a) or Section 6(b).

Defendants concede, and I agree, that notwithstanding the reservation of jurisdiction by the Circuit Court of Appeals in its decree, the Commission may investigate any
86 violations which it has reason to believe defendants are committing. In order to accomplish this the Commission may file a new complaint against defendants, alleging in what manner it considers that defendants are violating the Act. Or penalty proceedings under Section 5(1) may be initiated by the United States for alleged violations of the former decree in the Circuit Court of Appeals. Or contempt proceedings may be brought in the Circuit Court of Appeals.

The Commission insists that this is not a Section 5 proceeding, nor is it an attempt on the part of the Commission to enforce the decree of the Circuit Court of Appeals or the Commission's modified order to cease and desist; that it is purely an investigation to determine whether the defendants are complying with the former decree and the Commission's order. It seems to me, however, that the Commission is attempting indirectly to use the power given to it under Section 5 in order to secure the information it seeks under Section 6(a) and 6(b).

The Commission insists that under Section 6(g) it has the power to make rules and regulations for the purpose of carrying out the provisions of this Act. That under this authority it has promulgated Rule XXVI providing for the filing of reports and supplemental reports showing com-
87 pliance with the Commission's orders. Defendants challenge this authority on the ground that nowhere in the Act is any statutory authority given to the Commission to require either compliance or supplemental compliance reports. The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6(b).

Subparagraph (a) of Rule XXVI provides for an origi-

nal report of compliance with the Commission's cease and desist order. Subparagraph (b) sets out the right of the Commission to require from time to time, further supplemental reports of compliance. Subparagraph (c) provides how the reports shall be signed. Defendants urge that no court has ever declared this rule to be lawful, valid and enforceable; and that not until the present time, almost thirty-four years after the enactment of the Federal Trade Commission Act, has the Commission made an attempt to enforce subparagraph (b) thereof in a Section 5 proceeding. Nowhere in Section 5 can I find any reference whatever to compliance reports. Section 5 provides for the finality of a cease and desist order as soon as the jurisdiction of the Federal Trade Commission over it has been transferred to the Circuit Court of Appeals, but nowhere does Section 5 confer upon the Commission authority to make rules, and no rule-making paragraph of any statute could confer upon an administrative body authority to substantially alter the explicit provisions of a statutory enactment such as Section 5 of the Federal Trade Commission Act.

For all of the reasons set out herein I am of the opinion that plaintiff's motion for summary judgment for a mandatory injunction commanding defendants to file the reports requested by the Commission's order of September 2, 1947, and for judgment against the defendants in the amount of $100.00 a day for each day from and after April 1, 1948, should be denied.

Defendants' motions for summary judgment that defendants are not liable for the $100.00 a day penalty are allowed, and the complaint herein is dismissed for the reason that I believe this Court is without jurisdiction to entertain the same.

Philip L. Sullivan,
Judge.

August 19, 1948.

89 And afterwards, to wit, on the 20th day of August, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

90 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698) * *

ORDER.

This cause coming on to be heard on the complaint and the answer heretofore filed herein, and on the motion for summary judgment, with a supporting affidavit, heretofore filed herein by the plaintiff, and on the motion for summary judgment, with a supporting affidavit, heretofore filed herein by the defendant, and on the brief and answering brief of the plaintiff, and on the brief and answering brief of the defendant, and their being no genuine issue as to any material fact involved in this case, and the Court being fully advised in the premises, and, under date of August 19, 1948, this Court having issued and filed its memorandum opinion and decision herein:

It Is, Therefore, Adjudged, Ordered And Decreed that the plaintiff's motion for summary judgment for a mandatory injunction commanding the defendant to file the report requested by the Commission's order of September 2, 1947, more fully described in said memorandum opinion and decision, and for judgment against the defendant in the amount of $100 a day for each day from and after April 1, 1948, be and the same hereby is denied; and

91 Be It Further Ordered, Adjudged And Decreed that the defendant's motion for summary judgment that defendant is not liable for the $100 a day penalty be and the same hereby is allowed, and judgment is hereby entered for the defendant and against the plaintiff with respect thereto; and that defendant's motion for summary judgment that it is not liable to file the report requested by the said Commission's order of September 2, 1947, be and the same hereby is allowed, and with respect thereto the complaint herein is dismissed for lack of jurisdiction of this Court.

Enter:

Philip L. Sullivan,

Date: August 20, 1948. *Judge.*

92 And afterwards on, to wit, the 15th day of October, 1948, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice Of Appeal in words and figures following, to wit:

93 IN THE UNITED STATES DISTRICT COURT,

For the Northern District of Illinois,

Eastern Division.

United States of America,
Plaintiff.
vs.
Morton Salt Company,
Defendant.
No. 48-C-698.

NOTICE OF APPEAL.

The United States of America, plaintiff-appellant, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 20, 1948, dismissing plaintiff-appellant's complaint.

Otto Kerner, Jr.,
United States Attorney.

October , 1948.

(Attached Hereto Is The Following Certificate):

94 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 18th day of October, 1948, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Asheraft and Asheraft,
Charles H. G. Kimball,
134 S. La Salle Street,
Chicago, Illinois;

McBride and McBride,
L. M. McBride, E. H. Baker, Jr.,
Harvey Wienke and James T. Welch,
120 South La Salle Street,
Chicago, Illinois.

Roy H. Johnson,
Clerk.

(Seal)

95 And on the same day, to wit, the 3rd day of November, 1948, came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement Of Points On Appeal in words and figures following, to wit:

96 In the District Court of the United States.

* * (Caption—48-C-698) * *

PLAINTIFF-APPELLANT'S STATEMENT OF POINTS ON APPEAL.

Comes now the United States of America, plaintiff-appellant in the above-entitled cause, and says that it relies upon the following points in the prosecution of its appeal from the final judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 20, 1948.

1. The District Court erred in holding that this action was instituted for the purpose of enforcing compliance with a modified order to cease and desist issued by the Federal Trade Commission.

2. The District Court erred in holding that this action was instituted for the purpose of enforcing compliance with a decree of the Court of Appeals for the Seventh Circuit.

3. The District Court erred in holding that the order of the Federal Trade Commission dated September 2, 1947, did not initiate an investigation authorized by subsections (a) and (b) of Section 6 of the Federal Trade Commission Act and by Rule XXVI of the Rules of Practice of the Federal Trade Commission.

97 4. The District Court erred in holding that the supplemental compliance report sought by the Federal Trade Commission through its order dated September 2, 1947, is not the kind of report set out in subsection (a) or subsection (b) of Section 6 of the Federal Trade Commission Act.

5. The District Court erred in holding that the Federal Trade Commission had no authority to investigate compliance with an order to cease and desist issued by the

Federal Trade Commission by issuing a special order requiring the defendant to file a special report.

6. The District Court erred in holding that Section 6 of the Federal Trade Commission Act is only to be invoked in support of general economic surveys.

7. The District Court erred in holding that subsection (b) of Section 6 may not be invoked by the Federal Trade Commission in connection with investigations of compliance with orders to cease and desist issued by the Federal Trade Commission against corporations under Section 5 of the Federal Trade Commission Act.

8. The District Court erred in failing to hold that the Federal Trade Commission has the inherent power under Section 5 of the Federal Trade Commission Act to require reports of compliance with orders to cease and desist issued under that section.

9. The District Court erred in holding that the Federal Trade Commission had no authority to promulgate Rule XXVI of its Rules of Practice for the purpose of carrying out the provisions of Section 5 of the Federal Trade Commission Act.

98 10. The District Court erred in stating that it was the position of the Federal Trade Commission "that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6 (b)."

11. The District Court erred in holding that subsection (g) of Section 6 of the Federal Trade Commission Act authorizes the Federal Trade Commission to promulgate rules only for the purpose of carrying out the provisions of Section 6, and does not authorize the Federal Trade Commission to promulgate rules for the purpose of carrying out the provisions of Section 5 and the remaining sections of the said Act.

12. The District Court erred in failing to hold that the Federal Trade Commission has the inherent power to promulgate rules of practice for the purpose of carrying out the provisions of all of the sections of the Federal Trade Commission Act.

13. The District Court erred in holding that Sections 5 and 6 of the Federal Trade Commission Act must be considered separately and that the powers conferred by Sec-

tion 6 are wholly unrelated to the powers conferred by Section 5.

14. The District Court erred in holding that the only methods of investigating compliance with orders to cease and desist issued by the Federal Trade Commission are by issuing new complaints, by initiating civil penalty proceedings under subsection (1) of Section 5 of the Federal Trade Commission Act, and by initiating contempt proceedings in a court of appeals for violation of decrees affirming and enforcing the said orders to cease and desist.

99 15. The District Court erred in taking into consideration the legislative history of an Act of Congress where the language of the statute is clear and unambiguous and permits only one interpretation.

16. The District Court erred in holding that the legislative history of subsection (b) of Section 6 of the Federal Trade Commission Act indicates that Congress intended that the subsection be invoked only in connection with general economic surveys being conducted by the Federal Trade Commission.

17. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act applies only to a failure of corporations to file reports required by the Federal Trade Commission in general economic surveys.

18. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act was not applicable to a failure to comply with an order requiring information as to the manner in which an order to cease and desist is being observed.

19. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act was not applicable to a failure to attach copies of price lists, freight rate books and terms and conditions of sale to a special report required by the Federal Trade Commission.

20. The District Court erred in holding that it had no jurisdiction to entertain the suit.

21. The District Court erred in entering the final judgment herein.

100 22. The District Court erred in denying plaintiff's motion for summary.

23. The District Court erred in allowing defendant's motion for summary judgment.

Wherefore, the plaintiff-appellant, the United States of America, prays that the said final judgment in this cause may be reversed, and for such other and further relief as may be just in the premises.

Otto Kerner, Jr.,
United States Attorney,
Chicago, Illinois.

John P. Lulinski,
Assistant United States Attorney,
Chicago, Illinois.

J. Stephen Doyle, Jr.,
Special Assistant to the Attorney General,
United States Department of Justice,
Washington, D. C.

Joseph S. Wright,
Assistant General Counsel,
Federal Trade Commission,
Washington, D. C.

J. B. Truly,
Special Attorney,
Federal Trade Commission,
Washington, D. C.

101 And afterwards on, to wit, the 3rd day of November, 1948 came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record on Appeal in words and figures following, to wit:

102 In the District Court of the United States.

* * (Caption—48 C 698) * *

DESIGNATION OF RECORD ON APPEAL

United States of America, plaintiff-appellant, designates the entire record for transmittal on appeal.

Otto Kerner, Jr.,
United States Attorney.

November 3, 1948.

103 Northern District of Illinois, } ss:
Eastern Division. }

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation of Record on Appeal filed in this Court in the cause entitled: United States of America, Plaintiff, *vs.* Morton Salt Company, Defendant, No. 48 C. 698, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 10th day of November, 1948.

Roy H. Johnson,
Clerk.

By Gizella Butcher,
Deputy Clerk.

(Seal)

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of the record, filed in this Court on December 30, 1948, in

Cause No. 9753

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

MORTON SALT COMPANY, DEFENDANT-APPELLEE

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of July, A. D. 1949.

[SEAL] (S.) KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the fifth day of October, in the year of our Lord, one thousand, nine hundred and forty-eight, and of our Independence the one hundred-seventy-third.

No. 9753

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

MORTON SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

And afterward, to-wit, on the eleventh day of March, 1949, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

March 11, 1949

Before: Hon. J. Earl Major, Chief Judge

No. 9753

United States of America, plaintiff-appellant,

vs.

Morton Salt Company, defendant-appellee

No. 9754

United States of America, plaintiff-appellant,

vs.

International Salt Company, defendant-appellee

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

Pursuant to stipulations of counsel, it is ordered:

(1) That the above entitled appeals be consolidated for the purposes of oral argument;

(2) That the plaintiff-appellant be allowed one hour and fifteen minutes for oral argument and the two defendants-appellees be allowed an aggregate of one hour and fifteen minutes for oral argument, with the latter time to be divided between the defendants-appellees as they see fit; and

(3) That the oral argument for the consolidated hearing in these cases be set for Tuesday, April 12, 1949, at 9:30 A. M.

And afterward, to-wit, on the twentieth day of May, 1949, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1948, APRIL SESSION, 1949

Nos. 9753-9754

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

MORTON SALT COMPANY, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

INTERNATIONAL SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

May 20, 1949

Before MAJOR, *Chief Judge*, MINTON and DUFFY, *Circuit Judges*

MAJOR, *Chief Judge:*

This action was commenced by the United States against numerous defendants, including International Salt Company and Morton Salt Company. From an adverse judgment entered August 20, 1948, the government separately appealed as to these two defendants. Only issues of law are involved in each appeal, and, being identical, they may appropriately be considered and disposed of in a single opinion.

The action, according to the complaint, was instituted by the Attorney General upon request of the Federal Trade Commission (hereinafter called the Commission) for the enforcement of a Commission order "requiring additional reports of compliance," and to recover forfeitures for failure of defendants to comply with such order. The action is predicated upon Title 15 U.S.C.A. Sec. 49,[1] which vests the several District Courts of the United States with jurisdiction to direct a corporation to comply with an order issued by the Commission, and Sec. 50, which vests any District Court with jurisdiction of suits by the United States for the recovery of for-

[1]Section numbers used in this opinion, unless otherwise noted, refer to the Federal Trade Commission Act, Title 15 U.S.C.A.

feitures if a corporation fails to file any report so required within the time fixed by the Commission.

The order sought to be enforced was issued by the Commission on September 2, 1947, under the authority asserted to reside in Rule XXVI, promulgated by the Commission, and Sec. 46 (a) and (b) of the Act. The complaint sets forth verbatim the order relied upon and the notice of default served on the defendants. There are attached to the complaint numerous exhibits, including a copy of Rule XXVI.

The court below in a well reasoned opinion held that it was without jurisdiction to entertain the cause of action. United States v. Morton Salt Co. and International Salt Co. v. United States, 80 F. Sup. 419. This holding was predicated upon the conclusion that the Commission's order of September 2, 1947, was invalid because issued without authority. It is obvious, so we think, that the right to maintain the instant action is dependent upon the validity of the order.

The issue thus presented calls for a further statement of the factual situation. On September 18, 1940, the Commission issued its complaint under Sec. 45, charging defendants and others with engaging in an unlawful conspiracy to fix prices on and to control the production of salt in connection with the sale and distribution of that commodity in interstate commerce. On November 10, 1941, the Commission issued its order to cease and desist, requiring the defendants to discontinue the conspiracy alleged in the complaint. A petition for review of the Commission's order was filed by the defendants in this court which rendered its opinion March 8, 1943. Salt Producers Association v. Federal Trade Commission, 134 F. 2d 354. On April 20, 1943, this court entered its decree modifying the Commission's order in certain respects, affirming it as modified and directing compliance therewith. In effect, this court by its decree enforced the modified cease and desist order under Sec. 45 and commanded these defendants (as well as the others) to obey said decree, without prejudice to the right of the Commission to initiate contempt proceedings or penalty proceedings under Sec. 45 (l), and it required the defendants to file a compliance report within ninety days and reserved to this court "jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof * * *." Within the time thus designated in the decree of this court, each of the defendants filed a report with the Commission showing the manner and form in which they were complying with the court's decree. In the interim, during a period of more than five years, no question has been raised by the Commission as to the form or content of such compliance reports, and during said period the defendants have not been charged with a violation of the decree of this court and no

request has been made by the Commission that this court order or direct an investigation into defendants' conduct.

The government apparently senses the insecurity of its position if it be held that the order sought to be enforced was in aid of or for the purpose of enforcement either of the decree of this court or the Commission's cease and desist order modified to conform therewith. And so any such purpose on the part of the Commission is disclaimed. There was no attempt, so it is asserted, to enforce either the court's decree or the Commission's order, but "the sole purpose of the order requiring the reports was to inquire as to the manner of compliance by defendants with the Commission's modified order to cease and desist * * and this Court's decree enforcing that order." We have some difficulty in following a theory that the purpose was merely to obtain information as to whether defendants have been violating the decree of this court and at the same time denying that such purpose bears any relation to its enforcement. We are informed that if the defendants are shown to have violated the order of the Commission modified in conformity with the decree of this court, two courses are open, (1) it can certify the facts to the Attorney General under Sec. 56 of the Act, requesting that he file a civil suit seeking civil penalties under the provisions of Sec. 45 (l), or (2) it can petition this court for a rule requiring defendants to show cause why they are not in contempt of court.

We, as the court below, do not agree with the government's contention that the Commission initiated a new investigation. The record plainly discloses that the controverted order was issued in connection with and as a part of the proceeding theretofore had under Sec. 45; in fact, the order itself calls for "an additional and supplemental report showing the manner and form of compliance with the modified order to cease and desist entered by the Commission on August 10, 1943, and with the decree of the Circuit Court of Appeals for the 7th Circuit entered on April 22, 1943." "Additional and supplemental" to what? The answer must be that such reference was to the report of compliance required by the decree of this court and that the order was only a further step in the proceeding of which this court retained jurisdiction. Any doubt in this respect is dispelled by the fact that the order of September 2, 1947, is given the same title and docket number as the Commission's original order dated November 10, 1941.

As already noted, this court retained jurisdiction "to enter such further orders * * as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof." The jurisdictional reservation thus provided was in conformity with Sec. 45 of the Act; in fact, a reading of this section discloses in unmistakable fashion that every vestige of jurisdiction over a proceeding such as that under discussion was definitely

lodged with the Court of Appeals. The court is given the power to enter a decree "affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed," and "the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." It is also provided, "The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari." Not only was the court endowed with jurisdictional power, but by subsection (d) it was provided that such jurisdiction "shall be exclusive."

Thus, with enforcement jurisdiction so firmly and exclusively lodged in a Court of Appeals both by the statute and decree of the court, it would seem that one who asserts such jurisdiction to reside elsewhere is confronted with a heavy burden which can be met only by a rule or statutory provision, which makes clear a legislative purpose to impair or divide the jurisdictional responsibility provided in Sec. 45. Language which only confuses the situation or raises a doubt should not be accepted as sufficient.

An analysis of Sec. 46 furnishes no sound basis for the contention either that it can be utilized as an aid to a proceeding under Sec. 45 or that it was intended to impair or detract from the unambiguous and exclusive jurisdictional provision of that section.

Sec. 46, so far as relevant, empowers the Commission in paragraph (a) "To gather and compile information concerning, and to investigate * * the organization, business, conduct, practices, and management of any corporation * * and its relation to other corporations and to individuals, associations and partnerships," and in paragraph (b) "To require, by general or special orders, corporations, * * or any class of them, or any of them * * to file with the commission * * annual or special, or both annual and special, reports or answers in writing to specific questions * *," which will inform the Commission regarding the business affairs of those corporations, and the "relation" thereof "to other corporations, partnerships, and individuals * *."

Not only does the language fail to to reveal any interdependence of the two sections, but the opposite is indicated. Sec. 46 is directed solely to a "corporation," while Sec. 45 refers to any "person, partnership or corporation." Also, Sec. 46 is concerned with "annual or special, or both annual and special, reports," while Sec. 45 makes no mention of reports but leaves it to the court to "issue its own order commanding obedience to the terms of such order of the Commission."

Both sides have set forth, particularly with reference to Secs. 45 and 46, a large amount of legislative history, a discussion of which would serve no useful purpose. It can be safely said, however, that such history discloses that Secs. 45 and 46 were not intended as com-

plementary but were designed as separate and distinct, each directed to different situations. The dual purposes embodied in the two sections were recognized in F.T.C. v. Millers' National Federation, 47 F. 2d 428, 429, wherein the court stated: "The power of investigation conferred upon the Commission by section 6 is different in character from the jurisdiction conferred by section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation." See also F.T.C., et al. v. Claire Furnace Co., et al., 274 U. S. 160, 170.

The report required by the controverted order, as already noted, calls for "an additional or supplemental report showing the manner and form of compliance," while Sec. 46 is limited to "annual or special reports." In order to bridge this gap we are urged to hold that there is no difference between "an additional or supplemental report" and a "special report." We are not impressed with this reasoning. It seems reasonably plain to us that the term "special report," as used in Sec. 46, means something entirely different and distinct from "an additional or supplemental report showing the manner and form of compliance." This view is strengthened from the fact that Sec. 50, upon which the instant forfeiture action is predicated, provides for recovery for failure to file "any annual or special report * * within the time fixed by the Commission." It is of significance that this forfeiture section and Sec. 46 characterize the report precisely in the same manner. No forfeiture is provided for failure to file "an additional or supplemental report," as called for by the Commission's order in the instant matter. In fact, reports so designated are not, so far as we are aware, referred to any place in the Act.

Admittedly, the report required by the Commission's order in the instant matter is not an "annual report," and we think it equally plain that it is not a "special report." This view finds support in the House Committee's report on interstate and foreign commerce (Report No. 533, 63rd Congress, 2nd Session), wherein annual and special reports are discussed. The congressional committee stated the purpose in authorizing the Commission to require special reports as follows: "The Commission under this section may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in its annual report does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by special report such additional information as the Commission may deem necessary." It thus appears that the purpose of the "special report" was to enable the Commission to obtain information which had not been furnished in the "annual report." In other words, the "special report" was intended as additional or

supplemental to the "annual report" but not as additional or supplemental to an order of compliance under Sec. 45.

Irrespective, however, of Sec. 46, the Commission argues that its order is authorized by Rule XXVI. The substance of this rule is contained in two unnumbered paragraphs. The first paragraph requires that a report of compliance be made to the Commission within sixty days (1) after a cease and desist order has been issued by the Commission, or (2) where the parties stipulate to cease and desist. This paragraph contains a proviso as follows: "* * provided, however, that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination * *." We do not understand the government to contend that this paragraph is of any aid to its contention in the instant situation. Obviously, it is not because reports of compliance were made by the defendants within the time fixed by the court. It is interesting to note, however, that this court in its decree fixed ninety days within which the defendants were required to comply rather than the sixty days provided in the rule. It would seem either that the rule was not called to the court's attention or that it was ignored. And we have no doubt that the sixty-day limitation contained in this proviso was not binding upon the court, which had the authority to fix such time for compliance as it saw fit.

The Commission relies upon the second paragraph of the rule, which provides:

> "Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation."

The scope of this rule appears to depend upon what is meant by "such order * * and any party entering into such stipulation." Does it refer only to an order entered by the Commission and a party entering into a stipulation as provided for in the first paragraph of the rule, or does it include a court decree or an order of the Commission merged therein, as the plaintiff here contends?

The Commission, in support of its authority, relies upon Sec. 46 (g), which provides:

> "From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."

Thus, two powers are conferred upon the Commission, (1) to classify corporations and (2) to make rules and regulations, and such

powers are joined by the conjunction "and," which would indicate that the latter power is related to the former. As already noted, it is only Sec. 46 which is limited to corporations, while Sec. 45 includes any "person, partnership, or corporation." If the plaintiff's contention be accepted that the Commission is authorized by this provision to promulgate a rule directed to the enforcement of Sec. 45, then the exclusive jurisdiction which that section confers upon courts becomes little more than an empty gesture. We need not labor this point, however, because what we have said concerning Sec. 46 as it relates to Sec. 45 is also pertinent to Rule XXVI. In our view, the authority contained in Sec. 46 (g) must be limited to Sec. 46. Use of language which indicates a broader scope is not difficult to understand because at the time of the insertion of Sec. 46 (g) there was no Sec. 45, and when the latter section was added there was a failure to remove or modify Sec. 46 (g). If the latter section be given the scope urged by the plaintiff, the Commission would have the authority by rule to impair or share the "exclusive jurisdiction" which is expressly conferred upon the courts by Sec. 45.

And it appears that the plaintiff in the lower court placed no such reliance upon this rule as it does here. At any rate, that court (80 F. Sup. 419, 425) stated: "The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6 (b)." The plaintiff here insists that its position was misinterpreted and quotes from its brief in that court. We note, however, the following statement from its quotation: "This rule was promulgated under subsection (g) of Sec. 6 and implements the authority granted the Commission by subsection (b) thereof." In our view, that was the purpose of the rule and the extent of its intendment. We are of the view that it furnishes no support for the controverted order before us.

Plaintiff also argues that the Commission has the inherent power to require reports of compliance with its orders to cease and desist. We need not explore the validity of this argument as it is beside the point. We are not here concerned with the power of the Commission, inherent or otherwise, to enforce its own orders, but with its power to enforce or aid in enforcement of a decree of this court or an order of the Commission which has become merged in a decree of this court. This we think it had on its own initiative no power or authority to do.

The judgment appealed from is affirmed.

MISTON, *Circuit Judge*, dissenting.

A cease and desist order of the Federal Trade Commission that has become final without review or after review by this Court and is not complied with, may result in judgment by a District Court for a civil penalty under 15 U.S.C. Sec. 45(1) or enforcement pro-

ceedings before the reviewing Court of Appeals, 15 U.S.C. Sec. 45 (d). Noncompliance may result in dual action—one, for a penalty before the District Court; two, for enforcement by contempt proceedings by the Court of Appeals; or a choice between the two remedies. Punishment for past delinquencies would seem to lie with the District Court. Enforcement looking to the future would seem to lie with the Court of Appeals. Whether to proceed for punishment or enforcement, or both, would require someone to produce the facts. This is the Commission's job. As I understand the instant proceeding, it is not an attempt at enforcement of this Court's decree by the proceeding here instituted in the District Court, and is therefore by no stretch of imagination an interference with the exclusive jurisdiction of this Court to enforce its orders. The instant proceeding is an attempt by the Commission to get the facts upon which to base a judgment as to whether there has been compliance, which, if present, results in no further proceedings; or noncompliance, which, if present, may lead to action for penalty or enforcement, or possibly both.

Does the Act authorize the Commission to use the procedure it has adopted here to get the facts? We must assume that the Commission is unable to tell from the data furnished whether there has been compliance. Public officers are presumed to act in good faith until the contrary has been made to appear. The Commission finds the authority for the present procedure to obtain the facts under 15 U.S.C. Sec. 46 (a) and (b) and under Rule 26 [1] promulgated by the Commission. It is the position of the Commission that either the rule or the statute is sufficient to justify its action.

It seems to me that when Congress enacted the Federal Trade Commission Act, it was providing an integrated act and not a compartmentalized act, as the majority of this Court seems to think. In my view of the case, it is unnecessary to deal with Sec. 46 (a) and (b) and the narrow, restricted construction thereof, as indulged in by the majority of this Court. I find ample support for the procedure of the Commission contained in its rules, read in conjunction with the provisions of the statute. Sec. 46 (g) of the statute provides:

> "Sec. 46. Additional powers of Commission.
>
> "The commission shall also have power—
>
> • • •
>
> "(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41-46 and 47-58 of this title."

[1] 12 Fed. Reg. 5448, August 12, 1947.

This, it will be noted, is a part of Sec. 46 which the majority of this Court holds applies only to corporations. The section just quoted specifically refers to Secs. 41-46. Sec. 45, which is within this reference, deals with persons, partnerships, and corporations, and the cease and desist order here involved arose out of a Sec. 45 proceeding. It seems clear to me that Congress by Sec. 46 (g) gave a broad power to make rules for the carrying out of the provisions of the whole Act. Under this power, the Commission promulgated Rule 26, the pertinent provisions of which read as follows:

> "In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; *provided, however,* that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination;
>
> • • •
>
> "Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation."

We are dealing here with a cease and desist order that has been reviewed by this Court. The rules of the Commission provide that in such a case, the time for filing a report of compliance *begins to run* from the final judicial determination. Nothing is said as to *how long after the time commences to run* the report of compliance shall be filed with the Commission. Apparently the reviewing court's order fixed that time and in the instant case, this Court fixed it at ninety days. Obviously, this rule in no manner interferes with the jurisdiction of this Court to make or enforce its order. Under this rule, whose validity is not challenged here, and which rule has the effect of law, the Commission may require a party to such cease and desist order "to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order."

What the Commission did on September 2, 1947, in the instant case was to require the defendants to file within thirty days after the service of notice additional reports showing in detail the manner and form in which the defendants had been and were complying with the cease and desist order and the decree of this Court, together with some supporting data. On September 22, 1947, the Commission, at the request of one of the respondents in the cease and desist order but not one of the defendants here, extended the time for filing the additional reports and data to November 1, 1947. The other eighteen respondents in the order complied. Apparently the Commission's procedure did not impress them as unusual. The defendants refused to comply and, being in default for more than thirty days after November 1, 1947, the Commission on February 27, 1948, served notice of default upon the defendants, and, upon their further failure to comply within thirty days, instituted the instant proceeding, pursuant to 15 U.S.C. Sec. 50, which provides:

> "If any corporation required by said sections to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day * * *."

This Sec. 50 refers to "special reports" required by "*said sections*," that is, Secs. 41-46 and 47-58 which are the essential provisions of the Act. True, the Commission's proceedings refer not to "special reports" but to "additional," "further" and "supplemental" reports. It seems to me to say the latter are not special reports is to indulge in a refinement in language that would not be countenanced even in a criminal proceeding. I think "additional," "further" and "supplemental" are the equivalent of "special," since they are all reports not required in the usual course.

The majority have stressed what it sees as an interference with this Court's jurisdiction to enforce its decree. This is a bit unsubstantial, it seems to me. If the facts obtained justify proceedings, the Commission might proceed only for the penalty under Sec. 45 (l). In that instance, the Commission would not have to consult this Court at all. If it sought enforcement it could only be in this Court in full recognition of its jurisdiction.

What this case adds up to is this: That the defendants have refused deliberately, and with full consciousness of the consequences, to comply with an order of the Commission made pursuant to lawful authority, and such deliberate refusal comes squarely within the punitive provisions of Sec. 50. The Commission's rules have been

published in the Code[2] as a part thereof, following 15 U.S.C. Sec. 45 (1946 Edition). Since the regulations, which are authorized by the statute, together with the statute authorized the procedure which the Commission has followed, the defendants have certainly not been misled. I would reverse the judgment of the District Court.

A TRUE COPY:

TESTE:

Clerk of the United States Court of Appeals for the Seventh Circuit.

And on the same day, to-wit, on the twentieth day of May, 1949, the following further proceedings were had and entered of record, to-wit:

United States Court of Appeals for the Seventh Circuit

May 20, 1949

Before

HON. J. EARL MAJOR, *Chief Judge*,
HON. SHERMAN MINTON, *Circuit Judge*,
HON. F. RYAN DUFFY, *Circuit Judge*.

No. 9753

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

MORTON SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

This case came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

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[2] The present rule is Rule 25 in the Code, the same number as in prior publications of the rule in 11 Fed. Reg. 7074-7075, June 26, 1946; 10 Fed. Reg. 7388, June 20, 1945.

United States Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the order of this Court consolidating the causes, the opinion of the Court and the Judgment of the Court in Cause No. 9753, United States of America, Plaintiff-Appellant, vs. Morton Salt Company, Defendant-Appellee, as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of July, A. D. 1949.

[SEAL] (S.) KENNETH J. CARRICK,

Clerk of the United States Court of Appeals for the Seventh Circuit.

☆ U. S. GOVERNMENT PRINTING OFFICE 1950 [illegible]

Supreme Court of the United States

Order allowing certiorari

Filed October 24, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is gra.....

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas and Mr. Justice Minton took no part in the consideration or decision of this application.

In the

United States Court of Appeals

For the Seventh Circuit

No. 9754

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

INTERNATIONAL SALT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

J-29799 The Gunthorp-Warren Printing Co., Chicago—12-20-48—65

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I Pleas had at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of July (it being the 5th day thereof) in the year of our Lord One Thousand Nine Hundred and Forty-Eight and of the Independence of the United States of America, the 173rd year.

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable Elwyn R. Shaw, District Judge.
Honorable William H. Holly, District Judge.
Roy H. Johnson, Clerk.
Thomas P. O'Donovan, Marshal.

Friday, August 20, 1948.

Court met pursuant to adjournment.

Present: Honorable Philip L. Sullivan, Trial Judge.

2 IN THE UNITED STATES DISTRICT COURT,

For the Northern District of Illinois,

Eastern Division.

United States of America,
Plaintiff,
vs.
International Salt Company,
Defendant.
} No. 48-C-699.

Be It Remembered, that, on to-wit, the 18th day of May, 1948, the above-entitled action was commenced by the filing of the following Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

3 IN THE UNITED STATES DISTRICT COURT
* * (Caption—48-C-699) * *

COMPLAINT.

Plaintiff, by Otto Kerner, Jr., United States Attorney in and for the Northern District of Illinois, acting under the direction of the Attorney General, upon request of the Federal Trade Commission, brings this action for the enforcement of an order of the Federal Trade Commission which required defendant to file a special report and for the recovery of forfeitures because of the failure of the defendant to comply with the said order.

1. The action arises under Title 15, U. S. C. A., Section 49, being Section 9 of the Act of September 26, 1914 (38 Stat. 717), as amended March 21, 1938 (52 Stat. 111) (the said Act as amended being hereinafter referred to as the "Act"), vesting the several district courts of the United States with specific jurisdiction to enter orders commanding a corporation to comply with any order issued by the Federal Trade Commission pursuant to the said Act,
4 and under Title 15, U. S. C. A., Section 50, being Section 10 of the said Act, vesting any district court

of the United States in which a corporation has its principal office or in which it does business with specific jurisdiction of suits by the United States for the recovery of forfeitures if the corporation shall fail to file any special report required by the said Act within the time fixed by the Federal Trade Commission for filing the same, as hereinafter more fully appears.

2. The defendant, International Salt Company, is a corporation organized and existing under the laws of the State of New Jersey. The defendant transacts a substantial part of its business in the Northern District of the State of Illinois.

3. During all the times herein mentioned defendant was engaged in the business of producing various types and grades of salt, and of selling and distributing such salt in interstate commerce, as "commerce" is defined in Title 15, U. S. C. A., Section 44, being Section 4 of the said Act.

4. The Federal Trade Commission, on September 2, 1947, issued an order pursuant to the provisions of Rule XXVI of its published Rules of Practice (12 Fed. Reg. 5444, 5448), promulgated under and in accordance with the provisions of Title 15, U. S. C. A., Section 46(g), being subsection (g) of Section 6 of the said Act, and pursuant to the provisions of Title 15, U. S. C. A.,
5 Section 46(a) and 46(b), being subsections (a) and (b) of Section 6 of the said Act, requiring the defendant to file a report with the Federal Trade Commission within 30 days after the date of service of the order. A true and complete copy of the said Rule XXVI is attached hereto marked "Exhibit A" and made a part hereof. The said order dated September 2, 1947, requiring the defendant to file the report is set forth in full below:

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 2nd day of September, A. D. 1947.

Commissioners:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

ORDER REQUIRING ADDITIONAL REPORTS OF COMPLIANCE FROM CERTAIN RESPONDENTS.

This matter coming on to be considered on the Commission's own motion and upon further consideration of the reports of compliance with the order to cease and desist heretofore received and filed on behalf of the respondents under dates of August 2 and August 3, 1943, and the Commission being of the opinion that the public interest requires that there be filed on behalf of the respondents named below, an additional and supplemental report showing the manner and form of compliance with the modified order to cease and desist entered by the Commission on August 10, 1943, and with the decree of the Circuit Court of Appeals for the 7th Circuit entered
6 on April 22, 1943, and pursuant to Rule XXVI of its published Rules of Practice, and the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (38 Stat. 721; 15 U. S. C. A. Sec. 46),

Now, Therefore, Be It Ordered that respondents Salt Producers Association; Avery Salt Company; Barton Salt Company; Carey Salt Company; Cayuga Rock Salt Company; Colonial Salt Company; Detroit Rock Salt Company; Diamond Crystal Salt Co., Inc.; International

Salt Company; Jefferson Island Salt Company, Inc.; Hardy Salt Company; Morton Salt Company; Myles Salt Company, Ltd.; Mulkey Salt Company; Ohio Salt Company; Ruggles & Rademaker Salt Company; Saginaw Salt Products Company; Union Salt Company; Watkins Salt Company; and American Salt Corporation, within thirty (30) days after service upon them of this order, shall file additional reports showing in detail the manner and form in which they have been, and are now, complying with said modified order to cease and desist and said decree of the United States Circuit Court of Appeals for the 7th Circuit;

It Is Further Ordered that there shall be submitted, as a part of such supplemental reports of compliance, a complete statement on the part of each of the producer respondents named above, of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944;

It Is Further Ordered that there shall be submitted as a part of such supplemental report of compliance on the part of respondent Salt Producers Association a statement of the present organization and objectives of said respondent association, together with a detailed description of all activities and services supplied to or conducted by said respondent association for or on behalf of its members from January 1, 1944, to date.

By the Commission.

Otis B. Johnson,
Secretary.

7 5. The order dated September 2, 1947, was served on the defendant by registered mail on September 4, 1947. A true and complete copy of the return receipt signed by the defendant showing service of the said order is attached hereto marked "Exhibit B" and made a part hereof.

6. The Federal Trade Commission, on September 22, 1947, issued its order extending until November 1, 1947, the time for filing the report required by its order dated September 2, 1947. A true and complete copy of the said order dated September 22, 1947, is attached hereto marked "Exhibit C" and made a part hereof.

7. The order dated September 22, 1947, was served on the defendant by registered mail on September 23, 1947. A true and complete copy of the return receipt signed by the defendant showing service of the said order is attached hereto marked "Exhibit D" and made a part hereof.

8. The Federal Trade Commission, on February 27, 1948, pursuant to Title 15, U. S. C. A., Section 50, being Section 10 of the said Act, issued its notice of default to defendant because of defendant's failure to file the report required by the order dated September 2, 1947. The notice of default is set forth in full below:

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 27th day of February, A. D. 1948.

8 Commissioners:

Robert E. Freer, Chairman,
Garland S. Ferguson,
Ewin L. Davis,
William A. Ayres,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

NOTICE OF DEFAULT TO INTERNATIONAL SALT COMPANY.

Whereas the Federal Trade Commission on September 2, 1947, pursuant to Rule XXVI of its published Rules of Practice and to the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (38 Stat. 721), issued its order requiring International Salt Company, a corporation, to file an additional and supplemental report within thirty days after service upon it of the said order showing in detail the manner and form in which it has been, and is now, complying with the modified order to cease and desist issued by the Commission on August 10, 1943, and further requiring Inter-

national Salt Company to submit as a part of its supplemental report of compliance "a complete statement • • • of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944"; and

Whereas the said order of the Commission dated September 2, 1947, was duly served upon International Salt Company by registered mail on September 4, 1947; and

Whereas the Commission, on September 22, 1947, issued its order extending the time for filing the said supplemental report of compliance until November 1, 1947; and

Whereas International Salt Company has failed to file the supplemental report of compliance containing the information required by the Commission's said order dated September 2, 1947, on or before November 1, 1947, or at any time thereafter prior to the date of this resolution, and no additional time having been requested by International Salt Company or granted by the Commission for the filing of the said report; and

Whereas Section 10 of the Federal Trade Commission Act (38 Stat. 723) provides in part as follows:

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

Now, Therefore, You, International Salt Company, Are Hereby Notified, as provided for in Section 10 of the Federal Trade Commission Act (38 Stat. 723), that you are in default in having failed to file the report containing the information required by the Commission's order dated September 2, 1947, on or before November 1, 1947, or at any time thereafter.

By the Commission.

Otis B. Johnson,
Secretary.

9. The said notice of default dated February 27, 1948, was served on the defendant by registered mail on March 1, 1948. A true and complete copy of the return receipt signed by the defendant showing service of the notice of default is attached hereto marked "Exhibit E" and made a part hereof.

10. The failure of the defendant to file the report required by the order of the Federal Trade Commission dated September 2, 1947, has continued for 30 days after notice of such default and is still continuing.

11. The defendant, because of its failure to file with the Federal Trade Commission on or before April 1, 1948, the report required by its order of September 2, 1947, is liable to pay to the United States a forfeiture in the sum of $100 for each and every day of the continuance of such failure.

Wherefore, Plaintiff Demands:

1. That the court issue a mandatory injunction commanding defendant, its agents, attorneys, employees and assigns to file with the Federal Trade Commission the report required by its order dated September 2, 1947.

2. Judgment against defendant in the amount of $100 a day for each and every day from and after April 1, 1948, the defendant has failed to file with the Federal Trade Commission the report required by its order of September 2, 1947.

3. That defendant pay the costs of this action.

4. That plaintiff be given such other and further relief as the court may deem just and proper.

United States of America,
By Otto Kerner, Jr.,
United States Attorney,
Chicago, Illinois.

J. Stephen Doyle,
Special Assistant to the Attorney General,
United States Department of Justice,
Washington, D. C.

Joseph S. Wright,
Assistant General Counsel,
Federal Trade Commission,
Washington, D. C.

J. B. Truly,
Special Attorney,
Federal Trade Commission,
Washington, D. C.

11 District of Columbia, } ss.
City of Washington. }

Otis B. Johnson, being first duly sworn, deposes and says that he is the Secretary of the Federal Trade Commission; that he makes this affidavit on behalf of the plaintiff in the foregoing complaint; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

Otis B. Johnson.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 3rd day of May, 1948.

Denis E. Connell,
(Seal) *Notary Public.*

My commission expires March 11, 1951.

12 Exhibit A.

Rule XXVI.

Reports Showing Compliance With Orders and With Stipulations.

In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts, or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; provided, however, that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the

final judicial determination; and provided further that where the order prevents the use of a false advertisement of a food, drug, device, or cosmetic, which may be injurious to health because of results from such use under the conditions prescribed in the advertisement, or under such conditions as are customary or usual, or if the use of such advertisement is with intent to defraud or mislead, an interim report stating whether and how respondents intend to comply shall be filed within ten days.

13 Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation.

Reports of compliance shall be signed in ink by respondents or by the parties stipulating.

14 Exhibit B.

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 International Salt Co.
(Signature or name of addressee)
2 P. W. Griggs
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery Sep. 4, 1947.
(Pencil notation) 4320 Order requiring additional reports of compliance from certain respondents 50.

Post Office Department.
Official Business

Penalty for Private Use
To Avoid Payment
of Postage, $300
(GPO)

Postmark of Delivering Office

Return to Federal Trade Commission
(Name of Sender)

Street and Number,
or Post Office Box _____
Washington, D. C.

Registered Article
No. 370301
Insured Parcel

No. _____

15 Exhibit C.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 22nd day of September, A. D. 1947.

Commissioners:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

In the Matter of
Salt Producers Association, *et al.* } Docket No. 4320.

ORDER EXTENDING TIME FOR FILING ADDITIONAL REPORTS OF COMPLIANCE.

This matter coming on to be considered by the Commission upon the request of counsel for respondent Hardy Salt Company for an extension of time until November 1, 1947, within which to file additional reports of compliance pursuant to the Commission's order requiring same under date of September 2, 1947, and the Commission having duly considered said request, and being fully advised in the premises:

It Is Ordered that the time for filing additional reports of compliance pursuant to the order requiring such reports entered on September 2, 1947, be, and the same hereby is, extended for all respondents subject to such order until November 1, 1947.

By direction of the Commission:

Otis B. Johnson,
Secretary.

16 **Exhibit D.**

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 International Salt Co.
(Signature or name of addressee)
2 P. W. Griggs
(Signature of addressee's agent—Agent should enter addressee's name on line One above)

Date of delivery Sep. 23, 1947.

(Pencil notation) 4320 Order extending time additional report of compliance 60.

Post Office Department
Official Business

Penalty for Private Use To Avoid Payment of Postage, $300

Postmark of Delivering Office
Scranton, Pa.
Sep 23
4:30 PM
1947

Return to Federal Trade Commission
(Name of Sender)

Street and Number, or Post Office Box
Washington, D. C.

Registered Article No. 370659
Insured Parcel

No.

17 Exhibit E.

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 International Salt Co.
(Signature or name of addressee)
2 P. W. Griggs
(Signature of addressee's agent—Agent should enter addressee's names on line One above)

Date of delivery Mar. 1, 1948.

(Pencil notation) 4320 Notice of Default (International Salt Co.) 70

Post Office Department
Official Business

Penalty for Private Use
To Avoid Payment
of Postage, $300

Postmark of Delivering Office
Scranton, Pa.
Mar 1
9:30 PM
1948

Return to Federal Trade Commission
(Name of Sender)

Street and Number,
or Post Office Box _____
Washington, D. C.

Registered Article
No. 370544
Insured Parcel
No. _____

18 And afterwards on, to wit, the 26th day of May, 1948, there was filed in the Clerk's office of said Court a certain Summons, With Marshal's Return Endorsed Thereon, in words and figures following, to wit:

19 DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon Otto Kerner, Jr., U. S. Atty., plaintiff's attorney, whose address is 450 U. S. Court House, Chicago Ill., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Roy H. Johnson,
Clerk of Court.
By Marguerite Gilmour,
Deputy Clerk.

(Seal) [Seal of Court]

Date: May 18, 1948.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Served this writ, together with copy of complaint in the within named International Salt Co., a corporation, by delivering copies thereof to Louis H. Hall, Vice Pres., an agent of said corporation.

The president of said corporation not found in my district.

T. P. O'Donovan,
U. S. Marshal.
By Frank J. Reddy,
Deputy.

Served at U. S. C. H.
1 Service $2.00
Mileage $

Total $2.00

DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

SUMMONS IN CIVIL ACTION.

Returnable not later than 20 days after service.
Filed May 26, 1948 at —— o'clock.

Roy H. Johnson,
Clerk.

Otto Kerner, Jr.,
U. S. Atty., Attorney for Plaintiff.

20 And afterwards on, to wit, the 8th day of June, 1948, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Answer And Proof Of Service Of Answer in words and figures following, to wit:

21 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

The defendant, by Charles H. G. Kimball, Louis H. Hall and Frederic R. Sanborn, its attorneys, for its answer to the complaint herein, respectfully shows to this Honorable Court, as follows:

I. It alleges that heretofore and on or about the 10th day of November, 1941, the Federal Trade Commission made a certain cease and desist order against this defendant and against other respondents named therein, pursuant to the authority of Section 5 of the Federal Trade Commission Act, to which order it asks leave to refer at the trial of this action, should the terms and provisions of the said cease and desist order become material, with the same force and effect as if the same were set forth at full length herein.

II. It alleges that thereafter this defendant and certain other respondents named in the aforesaid cease and desist order of said Federal Trade Commission duly appealed to the Circuit Court of Appeals for the Seventh Circuit; that thereafter said appeal duly came on to be heard before the said Circuit Court of Appeals; that thereafter and on

or about the 20th day of April, 1943, the said Circuit Court of Appeals duly modified the aforesaid cease and desist order of said Federal Trade Commission; that the said decree of the said Circuit Court of Appeals has heretofore, and long prior to the commencement of the present action, become final; that a true copy of the said decree is hereto annexed as Exhibit A hereof with the same force and effect as if the same were set forth herein at full length.

22 III. It alleges that by reason of the premises the prior proceedings heretofore had before the Federal Trade Commission as aforesaid under Docket 4320 of the said Federal Trade Commission were terminated by, and were merged in, the final decree and order of the said Circuit Court of Appeals, and that in consequence thereof the only jurisdiction, power and authority now remaining and existing in this matter is vested solely in said Circuit Court of Appeals pursuant to the terms and provisions of its aforesaid order and decree.

IV. That after the said Circuit Court of Appeals had made its said decree and order as aforesaid, this defendant duly filed with said Federal Trade Commission a report in writing setting forth in detail the manner and form in which it had complied with said decree, and that said Federal Trade Commission received and retained the said report in writing without making any objection whatsoever thereto.

V. Upon information and belief, that the Federal Trade Commission has not made any application or petition to the said Circuit Court of Appeals to obtain any further order therein, in accordance with the terms and provisions of the aforesaid decree of said Circuit Court of Appeals retaining jurisdiction thereof; upon information and belief, that there are not any actions, proceedings, applications or petitions now pending before the Circuit Court of Appeals in said cause #7909; that by reason of the premises the sole remedy of the Federal Trade Commission, and the only method of due and orderly procedure, to prevent multiplicity of actions, conflicting decisions and the harassment of this and other defendants, is for the said Federal Trade Commission to bring forward before said Circuit Court of Appeals a proceeding, an application or a motion for

23 such relief as said Federal Trade Commission may conceive itself to be entitled to in accordance with the terms and provisions of said decree of said Circuit Court of Appeals.

VI. Defendant denies each and every one of the jurisdictional allegations of paragraph 1 of the complaint herein, and it likewise respectfully denies that this Honorable Court, or any District Court of the United States, has any jurisdiction whatsoever of the present action, civil action #48C699.

VII. It admits the allegations of the first sentence of paragraph 2 of the complaint. For the purposes of the present action only, it does not deny the allegations of the second sentence of paragraph 2 of the complaint.

VIII. It admits all of the allegations of paragraphs 3, 5, 6, 7 and 9 of the said complaint.

IX. It admits that Exhibit A annexed to the complaint and referred to in paragraph 4 thereof is a true and complete copy of Rule XXVI of the Rules of Practice of the Federal Trade Commission; it admits that on or about September 2, 1947, the Federal Trade Commission issued a purported order of which a true copy is set forth in said paragraph 4 of the complaint. Except as hereinabove specifically admitted, it denies each and every allegation of paragraph 4 of the complaint, and it alleges affirmatively that the Federal Trade Commission lacked lawful power and jurisdiction to make the said order and, if it is claimed that Rule XXVI is applicable to this defendant, that said Commission lacked lawful power and jurisdiction to promulgate and to apply the aforesaid Rule.

X. It alleges that, having duly reserved the jurisdictional question of the power and authority of the said Commission, it duly filed with said Commission, on or about
24 March 26, 1948, a further report in writing, a true copy of which is hereto annexed as Exhibit B, with the same force and effect as if the same were set forth at full length herein, setting forth in detail the manner and form in which it had continued to comply with said decree; that said Federal Trade Commissioin had received and has retained the said report without making any objection whatsoever thereto; that in consequence thereof defendant has complied with said purported order, and that it is not now and never has been in default thereof.

XI. It admits that the paper set forth in paragraph 8 of the complaint is a true and complete copy of a purported notice of default, dated February 27, 1948. Save as hereinabove specifically admitted, it denies each and every allegation of said paragraph 8 of the complaint.

XII. It denies each and every allegation contained in paragraphs 10 and 11 of the said complaint.

XIII. It further alleges that said purported order of September 2, 1947, was issued by the Federal Trade Commission without notice to it and without giving it an opportunity to be present and to be heard with respect thereto; that such action by the Federal Trade Commission was a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States; and that, therefore, said purported order of September 2, 1947, is entirely null and void.

XIV. It further alleges that said Federal Trade Commission proceedings, Docket No. 4320, were filed under Title 15, U. S. Code, Section 45, being Section 5 of the Federal Trade Commission Act; that said purported order of September 2, 1947, of the Federal Trade Commission was entered under sub-sections 6(a) and 6(b) of said Act in connection with what purported to be an investigation of the compliance by the various respondents with said Final Decree of the United States Circuit Court of Appeals for the Seventh Circuit; and that the Federal Trade Commission is without lawful authority or jurisdiction to proceed under Sections 6 (a) and 6 (b) of said Act in connection with the attempted or purported enforcement of a degree of a Circuit Court of Appeals entered under Section 5 of said Act.

XV. It further alleges that said purported order of September 2, 1947, was issued in violation of the terms and provisions of the Fourth Amendment to the Constitution of the United States, in that it amounts to an illegal search and seizure of the books and records of the defendant.

XVI. It further alleges that the things required of it by said order of September 2, 1947, do not, nor does any of them, constitute a lawful or actual requirement to file an annual or special report within the meaning of said Section 10 of said Act for which the $100.00 per day penalty provision has been provided.

XVII. It further alleges that the procedure sought to be pursued by the Federal Trade Commission in the proceedings and in this action as set forth in the complaint and hereinabove referred to in this answer, are not reflected or set forth in any lawful rule of said Federal Trade Commission; nor has such procedure been duly published in the Federal Register as required and provided for under the

terms and provisions of Section 3 of the Administrative Procedure Act, 5 U. S. Code, Sections 1001-1011; and that the procedure attempted to be followed by said Federal Trade Commission as hereinabove referred to in the complaint and in this answer is in violation of the terms
26 and provisions of Section 6 of said Administrative Procedure Act,

Wherefore the defendant prays that the complaint herein be dismissed.

International Salt Company,
By Hervey J. Osborn,
Vice President.

Charles H. G. Kimball,
1620—134 South La Salle Street,
Chicago 3, Illinois.

Louis H. Hall,
165 Broadway,
New York 6, N. Y.

Frederic R. Sanborn,
165 Broadway,
New York 6, N. Y.

State of New York, }
County of New York. } ss.:

Hervey J. Osborn, being first duly sworn, deposes and says that he is a Vice President of International Salt Company, the defendant herein; that he makes this verification on behalf of the defendant in the foregoing answer; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

Hervey J. Osborn.

Subscribed and sworn to before me, Lois Johnston, a Notary Public in and for the County of New York and State of New York this 7th day of June, 1948.

Lois Johnston,
Notary Public.

(Seal)

Notary Public in the State of New York
Residing in New York County
New York County Clerk's No. 70
New York County Register's No. 108-J-O
Kings County Clerk's No. 34
Kings County Register's No. 83-J-O
Bronx County Clerk's No. 4.
Bronx County Register's No. 49-J-O
Commission Expires March 30, 1950

28 Exhibit "A".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

Salt Producers Association, a corporation, *et al.*,
Petitioners,
vs.
Federal Trade Commission,
Respondent.
} No. 7909.

FINAL DECREE AFFIRMING AND ENFORCING MODIFIED ORDER TO CEASE AND DESIST.

The petitioners herein, having filed with this Court on January 9, 1942, their petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent herein, under date of November 10, 1941, pursuant to the provisions of the Federal Trade Commission Act; and a copy of said petition having been served upon the respondent herein; and respondent having thereafter certified and filed herein, as required by law, a transcript of the entire record in the proceeding lately pending before it in which said order to cease and desist was entered, and the matter having been heard by this Court on briefs and oral argument and this Court thereafter on March 8, 1943 having rendered its decision that respondent is entitled to an order, and respondent having submitted to petitioners, pursuant to the Court's direction, a proposed order modifying its present order to meet the views expressed in the Court's opinion, and petitioners having been served with a copy of respondent's proposed modified order and having been heard with reference thereto;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that said modified order be, and the same hereby is, affirmed as follows:

* * * that the Salt Producers Association, a corporation, Avery Salt Company, a corporation, Barton Salt Company, a corporation, The Carey Salt Company, a corporation, Cayuga Rock Salt Company, a corporation, Colonial Salt

Company, a corporation, Detroit Rock Salt Company, a corporation, Diamond Crystal Salt Co., Inc., a corporation, International Salt Company, a corporation, Jefferson Island Salt Company, Inc., a corporation, Hardy Salt Company, a corporation, Morton Salt Company, a corporation, Myles Salt Company, Ltd., a corporation, Mulkey Salt Company, a corporation, Ohio Salt Company, a corporation, Rugg·les & Rademaker Salt Company, a corporation, Saginaw Salt Products Company, a corporation, Union Salt Company, a corporation, Watkins Salt Company, a corporation, Worcester Salt Company, a corporation, American Salt Corporation, a corporation, their officers, servants,
29 agents, and employees, and Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson and D. M. Metzger, respectively president and treasurer of said Stevenson, Jordan and Harrison, Inc., and their agents, servants, and employees, or any two or more of said parties, with or without the cooperation of others not parties hereto, in connection with the offering for sale, sale, and distribution of salt in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, or carrying out, or directing, instigating or cooperating in, any planned common course of action, mutual agreement, combination, or conspiracy, to fix or maintain the prices of salt or curtail, restrict, or regulate the production or sale thereof, and from doing any of the following acts or things pursuant to any such planned or agreed common course of action:

(1) Establishing or maintaining uniform prices for salt, or uniform terms and conditions in the sale thereof, or in any manner agreeing upon, fixing, or maintaining any prices, including terms and conditions of sale, at which salt is to be sold;

(2) Adhering, or promising to adhere, to be filed or published prices or terms and conditions of sale for salt pending the filing of changes therein with the Salt Producers Association, or with any other agency, or with each other;

(3) Continuing the delivered price zones heretofore used for making quotations and sales of salt, or establishing or maintaining any delivered price zones which are similar to those heretofore used in that their use would result as heretofore in making the delivered prices of the respective corporations identical despite their different costs of delivery;

(4) Exchanging, directly or through the Salt Producers' Association, or any other agency or clearing house, price lists, invoices, and other records of sale showing the quantity, current prices and terms and conditions of sale allowed by said corporations to dealers and distributors; provided, however, that nothing herein shall prevent said association from collecting and disseminating to the respective manufacturers figures showing the total volume of sales of salt without disclosing the sales volume of individual producers, for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(5) Exchanging, directly or through the medium of the Salt Producers Association, or any other agency, the names of distributors or dealers who receive special discounts; for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(6) Curtailing, restricting, or regulating the quantity of salt to be produced and sold by said corporations by any method or means during any given period of time for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(7) Doing, or causing to be done, any of the things forbidden by this order through the medium of said Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson or D. M. Metzger, or any other corporation, firm or individual.

* * * That Stevenson, Jordan and Harrison, Inc., and Charles R. Stevenson and D. M. Metzger as officers thereof, and their agents, servants, and employees, do forthwith cease and desist from doing or performing any of the things forbidden by this order, or aiding, assisting, or cooperating in the performance thereof.

* * * that nothing in this order is to be construed as prohibiting any of said corporations from entering into such contracts or agreements relating to the maintenance of resale prices as are not prohibited by the provisions of an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (The Sherman Act), as amended.

* * * that for the reasons appearing in the findings as to the facts the complaint herein be, and hereby is, dismissed as to the following: T. N. Harrison, C. H. Ferris, N. M. Ferris, E. G. Ackerman, A. H. Dyer, R. E.

Case, F. L. Sweetser, W. R. Guthrie, A. P. Nonweiler, D. M. Hudson, R. R. Bliss, L. B. Platt, and Howard Marvin.

It Is Hereby Further Ordered, Adjudged and Decreed that said modified order, in the terms above set forth, is hereby made the decree of this Court, and petitioners are hereby commanded to obey the same, without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the said modified order to cease and desist hereby affirmed, and without prejudice to the right of the Federal Trade Commission to initiate contempt proceedings for violations of this decree.

It Is Hereby Further Ordered, Adjudged and Decreed that within ninety (90) days after the entry of this decree, the petitioners shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which they have complied therewith.

This Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof, and retains jurisdiction to modify the decree if changed future conditions should warrant such modification.

By the Court:

Evan A. Evans,
William M. Sparks,
Otto Kerner,
United States Circuit Judges.

31 Exhibit "B".

March 26, 1948.

Federal Trade Commission,
Washington, D. C.

Gentlemen:

Reference is hereby made to the order of the Commission issued September 2, 1947 entitled "In the Matter of Salt Producers Association et al., Docket No. 4320", and the order dated February 27, 1947 entitled in the same matter and designated "Notice of Default to International Salt Company."

The undersigned, International Salt Company, respectfully represents that, pursuant to the order of the Commis-

sion entered November 10, 1941, as affirmed and modified by the United States Circuit Court of Appeals for the Seventh Circuit by order dated April 20, 1943, respondent, International Salt Company, duly filed, within the period limited by the said order of the Circuit Court of Appeals of the United States for the Seventh Circuit, its Report of Compliance with the terms of the said decree of said court, and that it has ever since complied with the said order and continues to comply therewith in manner and form as set forth in the said report. This respondent further respectfully represents that the Federal Trade Commission is without authority, power or jurisdiction under the said decree of the Circuit Court of Appeals for the Seventh District, or under Rule 26 of the Commission's published Rules of Practice, or the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act, or otherwise, to require this respondent to file an additional and supplemental report setting forth the matters and things specified in said order of the Commission dated September 2, 1947, and said Notice of Default dated February 27, 1948.

International Salt Company,
By H. J. Osborn,
Vice President.

32 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-699) * *

PROOF OF SERVICE OF ANSWER ON PLAINTIFF.

Received a copy of the defendant's Answer in the above entitled cause this 8th day of June, A. D. 1948.

Otto Kerner, Jr.,
U. S. Atty.
G. S. Morgan,
Attorney for Plaintiff.

33 And afterwards on, to wit, the 23rd day of June, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice And Motion For Summary Judgment, Affidavit of Frederic R. Sanborn, and Schedules A and B in words and figures following, to wit:

34 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

To: Otto Kerner, Jr., Esq., United States Attorney,
Attorney for Plaintiff,
450 U. S. Court House,
Chicago, Illinois.

NOTICE AND PROOF OF SERVICE.

Please Take Notice that on this 23rd day of June, A.D. 1948, I shall file with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, a Motion for Summary Judgment in the above entitled cause, supported by affidavit.

Charles H. G. Kimball,
Attorney for defendant,
1620—134 South LaSalle Street,
Chicago, Illinois.
FRA 2266.

Received a copy of the above Notice and Proof of Service, together with a copy of the Motion for Summary Judgment and supporting affidavit referred to therein.

Otto Kerner, Jr.,
Attorney for Plaintiff.

35 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

MOTION FOR SUMMARY JUDGMENT

Comes now International Salt Company, defendant, by Charles H. G. Kimball, its attorney, and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves the Court to enter a summary judgment in favor of the defendant, dismissing this action on the ground that there is no genuine issue between the plaintiff and the defendant as to any material fact, and that the defendant is entitled to judgment dismissing the action as a matter of law upon the uncontested facts set forth in the complaint and in the answer herein; or,

In the alternative, if summary judgment is not rendered in defendant's favor upon the whole case or for all the relief asked, and a trial is necessary, defendant moves that the Court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy, and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear to be without substantial controversy, and directing such further proceedings in this action as to it may seem just.

This motion is based upon:

(a) The complaint herein and its accompanying exhibits;

36 (b) The answer herein and its accompanying exhibits; and

(c) The annexed affidavit of Frederic R. Sanborn, verified June 18, 1948.

International Salt Company,
Defendant,

By Charles H. G. Kimball,
Its Attorney.

37 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

State of New York, }
County of New York. } ss:

Frederic R. Sanborn, being first duly sworn, deposes and says:

I am an attorney and counselor at law duly admitted and qualified to practice in the State of New York, and also before the Supreme Court of the United States of America.

I am familiar with the pleadings herein, and also with the earlier proceedings and pleadings (both before the Federal Trade Commission and before the United States Circuit Court of Appeals for the Seventh Circuit) which antedate the present action, but which are referred to in the pleadings herein.

I make the present affidavit on behalf of defendant in support of the present motion for the reasons that said defendant is a corporation and incapable of taking oath on its own behalf, and because I am familiar with all of the said proceedings and pleadings.

The present action is particularly suitable for summary judgment because I believe there are no factual disputes of any sort, and consequently the entire controversy is one of law and not of fact.

As appears from the complaint and from the answer herein, there was a proceeding involving this defendant (among others) before the Federal Trade Commission
38 some years ago which terminated in a final decree by the United States Circuit Court of Appeals for the Seventh Circuit (Answer: Exhibit A). That court in and by its final decree of April 20, 1943, retained jurisdiction over future proceedings as in said decree set forth.

Thereafter this defendant promptly, and in obedience to the said decree, filed with the Federal Trade Commission a statement on or about July 12, 1943, which, in the practice of the Federal Trade Commission, is sometimes called a Certificate of Compliance. A true copy of this report is hereto annexed as Schedule A hereof. This was received and at all times thereafter retained by the Federal Trade Commission without objection.

I am informed and verily believe that administrative changes were made within the Federal Trade Commission some months ago, in the course of which a new "Division of Compliance" was created.

This new "Division of Compliance" has apparently decided to attempt to create new forms of procedure, thirty-four years after the Federal Trade Commission was first established, and to claim to have and to exercise powers which, for the said thirty-four years last past, upon information and belief, the Federal Trade Commission has never at any time claimed to have or to exercise.

Accordingly, and on September 2, 1947, acting ex parte the Federal Trade Commission made an order which required of this defendant that it furnish the Commission with certain information (Complaint, pp. 3-4), thus bypassing the United States Circuit Court of Appeals for the Seventh Circuit and its retained jurisdiction to enforce the decree in question.

39 This defendant, acting under the advice of its counsel, took the position that the said "Division of Compliance" of said Commission was, without justification of law, seeking to beget a novel power which the Commission does not possess in the light of all the facts and circumstances of the present case.

Nevertheless, but reserving the matter of procedure and the questions of law, this defendant again filed with the said Commission a further statement in writing, dated March 26, 1948, (Answer: Exhibit B), setting forth its continued compliance with the original decree of the said Circuit Court of Appeals for the Seventh Circuit.

Meanwhile, and upon information and belief, the Chief of the Division of Compliance of the Federal Trade Commission, Joseph S. Wright, Esq., had called in person at Detroit, at the office of a corporation which was one of the other respondents before the Federal Trade Commission in the particular proceeding already described hereinabove and in the complaint and in the answer as Federal Trade Commission Docket #4320. James B. Wescott, Esq., of the law firm of Miller, Gorham, Wescott & Adams, was and is the general counsel for said other respondent, and, upon information and belief, engaged in conversation with Mr. Wright, the Chief of the Division of Compliance of the Federal Trade Commission. Thereafter and on or about February 17, 1948, Mr. Wright wrote Mr. Wescott

a letter concerning the conversation, and I annex hereto as Schedule B hereof what, upon information and belief, is a true copy of the said letter. A perusal of this letter will, I think, persuade this court beyond the shadow of any doubt that the recent proceedings of the Federal Trade Commission, and its purported order, dated September 2, 1947, referred to hereinabove, are simply and only steps in a novel attempt by the said Commission to enforce or to modify the aforesaid decree of the Circuit Court of Appeals of April 20, 1943, without submitting to the jurisdiction of that court, and in the endeavor to bypass the jurisdiction of that court.

The present litigation was commenced thereafter.

All of the documents necessary for the disposition of this motion, and referred to hereinabove are either contained in the complaint and answer, or are judicial decrees and written documents concerning the existence and phraseology of which there is no factual dispute.

The questions to be decided by this court include, in consequence, questions of law involving the retained jurisdiction and power of the Circuit Court of Appeals for the Seventh Circuit, and the remaining jurisdiction and powers, if any, thereafter of the Federal Trade Commission and of this Honorable Court, together with cognate legal problems.

Therefore I respectfully submit that the present case is a perfect case for summary judgment, and I respectfully request that summary judgment be granted in this action in favor of the defendant, dismissing the claims set forth in the complaint herein.

Frederic R. Sanborn.

Sworn to before me this 18th day of June, 1948.

Bertha E. Ronner
Notary Public in the State of New York
Residing in Kings County
Kings Co. Clk's No. 516, Reg. No. 50-R-9
N. Y. Co. Clk's No. 321, Reg. No. 45-R-9
Commission Expires March 30, 1949.

41 Schedule "A".

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of
Salt Producers Association *et al.* } Docket No. 4320.

REPORT OF INTERNATIONAL SALT COMPANY AS TO COMPLIANCE WITH ORDER TO CEASE AND DESIST ENTERED IN THE ABOVE MATTER AS SUCH ORDER WAS MODIFIED AND CONFIRMED BY DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, ENTERED APRIL 20, 1943.

In conformity with the above mentioned decree of the United States Circuit Court of Appeals for the Seventh Circuit requiring that within ninety (90) days after entry of the decree the undersigned should file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with the said order of the Federal Trade Commission as so modified and affirmed, International Salt Company does report as follows:

1. International Salt Company, its officers, servants and employees, since the making of the said order to cease and desist, have refrained from entering into, continuing, or carrying out, or directing, instigating, or cooperating in any planned common course of action, mutual agreement, combination or conspiracy to fix or maintain the prices of salt, or curtail, restrict or regulate the production or sale thereof, and in future will so refrain.

2. Since the entry of said order to cease and desist, International Salt Company has not been, and will not in the future be, a party to any planned or agreed common course of action in conjunction with any one or more of the parties to the said entitled proceeding, with or
42 without the cooperation of others not parties thereto, in establishing or maintaining uniform prices for salt, or uniform terms and conditions in the sale thereof, or

in any manner agreeing upon, fixing, or maintaining any prices, including terms and conditions of sale, at which salt is to be sold. The prices at which International Salt Company sells its product, and the terms and conditions of the sale thereof have been, since the entry of the said order, and in the future will be, established by International Salt Company acting independently of all others.

3. Since the entry of the said order to cease and desist, International Salt Company has not, pursuant to any planned or agreed common course of action or otherwise, adhered or promised to adhere to filed or published prices or terms and conditions of sale of salt pending the filing of changes therein within the Salt Producers Association, or with any other agency, or any other producer.

4. Since the making of the said order to cease and desist, International Salt Company has not continued any price zone heretofore used for making quotations and sales of salt, or established or maintained any delivered price zones which are similar in any respect to price zones heretofore used, pursuant to any agreed or common course of action. Certain of its products it sells upon a delivered price basis, and certain others of its products it sells upon the basis of a price f. o. b. its own works, so that the cost to its customer is its f. o. b. plant price, plus transportation charges to destination. Where special conditions, such as, among others, lower prices quoted by competitors or lower transportation costs from competitors works, make such action necessary in order to obtain desired business, it may lower its plant price or its delivered price.

43 The prices it charges for its products will vary from time to time and in different localities, such fluctuations in price resulting from various causes, such as, among many others, governmental regulation, transportation conditions and competition. Whatever variation or fluctuation in price from time to time may occur, price changes will be determined according to the best judgment of its management in pursuit of the general policy of so lawfully conducting its business as to procure for its stockholders a reasonable profit from its operations. No quotation for salt, whether upon a delivered price basis or otherwise, has been, since the entry of the said order to cease and desist, or will be in the future, the result of or in accordance with any planned or agreed common course of action with any other respondent, or with

any other producer, or with any one outside International Salt Company's own organization.

5. Since the entry of said order to cease and desist International Salt Company has not directly or through the Salt Producers Association or any other agency or clearing house exchanged, and will not in the future exchange, price lists, invoices and other records of sale showing the quantity, current prices and terms and conditions of sale allowed to dealers and distributors.

6. Since the entry of said order to cease and desist, International Salt Company has not, pursuant to any planned or agreed common course of action, or otherwise, exchanged, and will not in the future exchange, directly or through the medium of the Salt Producers Association or any other agency, the names of distributors or dealers who receive special discounts for the purpose or with the effect of restricting competition in the offering for sale or sale of salt.

44 7. Since the entry of the said order to cease and desist, International Salt Company has not, pursuant to any planned or agreed common course of action with the other respondents named in the said proceeding, or with any other producer, curtailed, restricted or regulated the quantity of salt produced and sold by any method or means during any given period of time for the purpose or with the effect of restricting competition in the offering for sale, or sale, of salt and will not in the future so curtail, restrict or regulate the quantity of salt to be produced and sold.

8. Since the entry of the said order to cease and desist, International Salt Company has not done, or caused to be done any of the things forbidden by said order to be done through the medium of Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson or D. M. Metzger, or any other corporation, firm or individual. Any association of this respondent with said Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson or D. M. Metzger was terminated long prior to the institution of the above entitled proceeding.

9. For the information of the Commission, this respondent respectfully begs leave to submit the following.

Named in the bill of complaint in this proceeding, in the order to cease and desist, and in the decree of the said United States Circuit Court of Appeals are "Detroit

Rock Salt Company, a corporation" and "Avery Salt Company, a corporation". In fact, said Avery Salt Company and said Detroit Rock Salt Company were not and are not parties to this proceeding for the reason that they were not in existence at the time process in this proceeding was issued and process therefore could not be served upon them. Long prior to the institution of the above entitled proceeding the said Avery Salt Company and the said Detroit Rock Salt Company had conveyed and transferred to this respondent all their property, business and good will and had ceased doing business, and had been formally and legally dissolved.

10. International Salt Company has in all things fully complied with the order of the Commission as amended by said decree and in future will continue so to do.

Respectfully submitted,

International Salt Company,

By Harry M. Griffiths,

Vice President.

Putney, Twombly & Hall,

Attorneys for International Salt Company.

By Louis H. Hall.

46 Schedule "B".

FEDERAL TRADE COMMISSION,
Washington 25.

Office of General Counsel.

February 17, 1948.

James B. Wescott, Esq.,
Miller, Gorham, Wescott & Adams,
One North LaSalle Street,
Chicago 2, Illinois.

Re: Docket No. 4320.
Salt Producers Association, et al.

Dear Mr. Wescott:

Your letter of February 16, 1948, is received and contents noted. With respect to your statement that you understood my position on the recent trip to Detroit to be that the inquiry conducted by Mr. Truly and myself might be related either to Docket No. 4320 or to a new investigation under Section 5, I have no recollection that there was any doubt but that the inquiry and request for information from Salt Producers Association was related to the proceeding in Docket No. 4320. As you yourself note, the letter of the Secretary of the Commission under date of January 26, 1948, made it perfectly clear that this was the purpose of the inquiry.

With regard to your request for my ideas on your suggestion that further action in this matter be deferred until after the decision of the Supreme Court in the Cement case; I fail to see that anything the Court might hold in the Cement case would affect or be relevant to the question of whether or not the respondents in Docket No. 4320 have been and are now complying with the Commission's order to cease and desist and the decree of the Circuit Court of Appeals.

Very truly yours,

(s) Joseph S. Wright,
Chief, Division of Compliance.

47 And afterwards on, to wit, the 24th day of June, 1948 came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Notice And Motion in words and figures following, to wit:

48 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

To: Otto Kerner, Jr., Esq., United States Attorney,
Attorney for Plaintiff,
450 U. S. Court House,
Chicago, Illinois.

NOTICE.

Please Take Notice that on June 24, A. D. 1948, at the opening of Court in the forenoon, or as soon thereafter as counsel may be heard, I shall appear before the Honorable Philip Sullivan, in the room usually occupied by him as a courtroom, in the United States Court House, Chicago, Illinois, and shall then and there move the Court for an order extending the time within which the defendant may file its brief in support of its Motion for Summary Judgment heretofore filed herein to and including July 15, 1948, at which time and place you may appear if you so see fit.

Charles H. G. Kimball,
Attorney for Defendant,
134 South LaSalle Street,
Chicago, Illinois.

Received a copy of the foregoing Notice, together with a copy of the Motion and proposed Order referred to therein, this 23rd day of June, A. D. 1948.

Otto Kerner, Jr.,
Attorney for Plaintiff.

49 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-699) * *

MOTION.

The defendant, International Salt Company, by Charles H. G. Kimball, its attorney, hereby respectfully moves the Court to enter an order extending the time within which said defendant may file a brief in support of its Motion for Summary Judgment heretofore filed herein to and including July 15, 1948.

Charles H. G. Kimball,
Attorney for Defendant,
134 South La Salle Street,
Chicago, Illinois.

50 And on the same day, to wit, the 24th day of June, 1948, came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

51 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-699) * *

STIPULATION.

It Is Hereby Stipulated by and between the parties hereto, by their respective attorneys, that the time within which the Defendant, International Salt Company, may file its brief in support of its Motion for Summary Judgment heretofore filed herein, shall be extended to and including July 15, 1948.

Otto Kerner, Jr.,
Attorney for Plaintiff.

Charles H. G. Kimball,
Attorney for Defendant.

52 And on the same day, to wit, on the 24th day of June, 1948, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

53 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

ORDER.

This Cause coming on to be heard upon the motion of International Salt Company, Defendant, by Charles H. G. Kimball, its attorney, and the Court being fully advised in the premises,

It Is, Therefore, Ordered, Adjudged and Decreed that the time within which the International Salt Company may file its brief in support of its Motion for Summary Judgment shall be in the same as hereby extended to and including July 15, 1948.

Enter:

Philip L. Sullivan,
Judge.

54 And afterwards on, to wit, the 15th day of July, 1948, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Two (2) Notices And Motion For Summary Judgment, Affidavit of Otis B. Johnson and Exhibit A, Pages 1, 2, 3 and 4 in words and figures following, to wit:

55 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—48-C-699) * *

NOTICE.

To: Charles H. G. Kimball, Esq.
c/o Ashcraft & Ashcraft
1620—134 South La Salle Street
Chicago 3, Illinois

Please Take Notice that on Thursday, July 15, 1948, at the hour of ten o'clock a. m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Michael L. Igoe, Judge of the District Court of the United States, or before such other Judge as may be sitting in his place and stead, in the courtroom usually occupied by him in the United States Court House at Chicago, Illinois, and then and there pray the entry of an order granting the Government leave to file a Consolidated Brief in support of its Motion for Summary Judgment heretofore filed, and further pray the entry of an order extending the Government's time to answer the respondent's Brief filed this day to include the date of August 9, 1948; at which time and place you may appear if you so deem fit.

Otto Kerner, Jr.,
United States Attorney.

Received a copy of the above and foregoing Notice this 14th day of July, A. D. 1948.

Charles H. B. Kimball,
Attorney for Defendant.

56 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-699) * *

NOTICE.

To: Charles H. G. Kimball, Esq.,
c/o Ashcraft & Ashcraft,
1620—134 South La Salle Street,
Chicago 3, Illinois.

Dear Sir:

Please Take Notice that the attached motion for summary judgment, with supporting affidavit, is being this day filed with the Clerk of the United States District Court for the Northern District of Illinois, at the United States Courthouse, Chicago, Illinois, and will be brought on for hearing before the Court as soon as counsel can be heard.

Dated this 14th day of July, 1948.

United States of America,
By Otto Kerner, Jr.,
United States Attorney,
Chicago, Illinois.

Receipt of a copy of the above notice and a copy of a motion for summary judgment with supporting affidavit annexed thereto is hereby acknowledged this 14th day of July, 1948.

Charles H. B. Kimball,
Attorney for Defendant.

57 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—48-C-699) * *

MOTION FOR SUMMARY JUDGMENT

United States of America, plaintiff, by its attorneys, acting pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves this Court for a summary judgment in favor of the plaintiff on the ground that the complaint, the answer of the defendant, International Salt Company, and the affidavit attached to this motion establish that there is no genuine issue as to any material fact, and that on the

undisputed facts the plaintiff is entitled as a matter of law to the judgment and to the relief demanded in the complaint and for which it moves herein.

In support of this motion, the affidavit of Otis B. Johnson is attached hereto.

United States of America,
By Otto Kerner, Jr.,
United States Attorney,
Chicago, Illinois.

J. Stephen Doyle, Jr.,
Special Assistant to the Attorney General,
United States Department of Justice,
Washington, D. C.

Joseph S. Wright,
Assistant General Counsel,
Federal Trade Commission,
Washington, D. C.

J. B. Truly,
Special Attorney,
Federal Trade Commission,
Washington, D. C.

58 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

AFFIDAVIT.

District of Columbia }
City of Washington } ss.

Otis B. Johnson, being first duly sworn, deposes and says that he is the Secretary of the Federal Trade Commission; that he makes this affidavit on personal knowledge; that the Federal Trade Commission, on August 10, 1943, issued its modified order to cease and desist in a proceeding before the Commission entitled In the Matter of Salt Producers Association, a corporation, et al., Commission Docket Number 4320; that the defendant herein, International Salt Company, was one of the respondents before the Commission against whom that modified order to cease and desist was issued; that the said modified order to cease and desist was served on the said International Salt Company by registered mail on August 11, 1943; that a true and complete copy of the said modified order to cease and desist is attached to this affidavit as Exhibit A and is made a part hereof; that nine of the corporations named in the Commission's order dated September 2, 1947, which order is copied in full in paragraph 4 of the complaint herein, have complied with that order by filing the special reports required thereby.

Otis B. Johnson.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 13th day of July, 1948.

Denis E. Connell,
Notary Public.

(Seal)

My commission expires March 11, 1951.

59 Exhibit A.

UNITED STATES OF AMERICA.

Before Federal Trade Commission.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 10th day of August, A. D. 1943.

Commissioners:

Garland S. Ferguson, Chairman,
Charles H. March,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer.

In the Matter of Salt Producers Association, a corporation; Avery Salt Company; Barton Salt Company; Carey Salt Company; Cayuga Rock Salt Company; Colonial Salt Company; Detroit Rock Salt Company; Diamond Crystal Salt Company, Inc.; International Salt Company; Jefferson Island Salt Company, Inc.; Hardy Salt Company; Morton Salt Company; Myles Salt Company, Ltd.; Mulkey Salt Company; Ohio Salt Company; Ruggles & Rademaker Salt Company; Saginaw Salt Products Company; Union Salt Company; Watkins Salt Company; Worcester Salt Company; American Salt Corporation; and Stevenson Corporation, a corporation, and its officers, Charles R. Stevenson, T. M. Harrison, C. H. Ferris, N. M. Perris, E. G. Ackerman, A. H. Dyer, R. E. Case, F. L. Sweetser, W. R. Guthrie, A. P. Nonweiler, S. M. Hudson, R. R. Bliss, L. B. Platt, Howard Marvin and D. M. Metzger, a partnership, doing business under the firm name of Stevenson, Jordan and Harrison.

Docket No. 4320

MODIFIED ORDER TO CEASE AND DESIST.

This proceeding coming on for further hearing before the Federal Trade Commission, and it appearing that

60 on November 10, 1941, the Commission made its findings as to the facts herein and concluded therefrom that respondents had violated the provisions of the Federal Trade Commission Act, and issued and subsequently served upon them its order to cease and desist; and it further appearing that respondents on January 9, 1942, filed in the United States Circuit Court of Appeals for the Seventh Circuit petition to review and set aside the Commission's order, and that on March 8, 1943, the said court rendered its opinion and on April 20, 1943, issued its decree modifying the aforesaid order of the Commission in certain particulars and affirming the order in other particulars:

Now, Therefore, pursuant to the provisions of Subsection (i) of Section 5 of the Federal Trade Commission Act, the Commission issues this its modified order to cease and desist in conformity with said decree:

It Is Ordered that the respondents Salt Producers Association, a corporation, Avery Salt Company, a corporation, Barton Salt Company, a corporation, The Carey Salt Company, a corporation, Cayuga Rock Salt Company, a corporation, Colonial Salt Company, a corporation, Detroit Rock Salt Company, a corporation, Diamond Crystal Salt Co., Inc., a corporation, International Salt Company, a corporation, Jefferson Island Salt Company, Inc., a corporation, Hardy Salt Company, a corporation, Morton Salt Company, a corporation, Myles Salt Company, Ltd., a corporation, Mulkey Salt Company, a corporation, Ohio Salt Company, a corporation, Ruggles & Rademaker Salt Company, a corporation, Saginaw Salt Products Company, a corporation, Union Salt Company, a corporation, Watkins Salt Company, a corporation, Worcester Salt Company, a corporation, American Salt Corporation, a corporation, their officers, servants, agents, and employees, and Stevenson, Jordan and Harrison, Inc., Charles R. Stevenson and D. M. Metzger, respectively president and treasurer of said Stevenson, Jordan and Harrison, Inc., and their agents, servants, and employees, or any two or more of said respondents, with or without the cooperation of others not parties hereto, in connection with the offering for sale, sale, and distribution of salt in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, or carrying out, or directing, instigating, or cooperating in, any planned common course of action, mutual agreement, combination, or conspiracy, to fix or main-

tain the prices of salt or curtail, restrict or regulate the production or sale thereof, and from doing any of the following acts or things pursuant to any such planned or agreed common course of action:

61 (1) Establishing or maintaining uniform prices for salt, or uniform terms and conditions in the sale thereof, or in any manner agreeing upon, fixing, or maintaining any prices, including terms and conditions of sale, at which salt is to be sold;

(2) Adhering, or promising to adhere, to filed or published prices or terms and conditions of sale for salt pending the filing of changes therein with the Salt Producers Association, or with any other agency, or with each other;

(3) Continuing the delivered price zones heretofore used for making quotations and sales of salt, or establishing or maintaining any delivered price zones which are similar to those heretofore used in that their use would result as heretofore in making the delivered prices of the respective corporations identical despite their different costs of delivery;

(4) Exchanging, directly or through the Salt Producers Association, or any other agency or clearing house, price lists, invoices and other records of sale showing the quantity, current prices and terms and conditions of sale allowed by said corporations to dealers and distributors; provided, however, that nothing herein shall prevent said association from collecting and disseminating to the respective manufacturers figures showing the total volume of sales of salt without disclosing the sales volume of individual producers, for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(5) Exchanging, directly or through the medium of the Salt Producers Association, or any other agency, the names of distributors or dealers who receive special discounts; for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

(6) Curtailing, restricting, or regulating the quantity of salt to be produced and sold by said corporations by any method or means during any given period of time for the purpose or with the effect of restraining competition in the offering for sale, or sale, of salt;

62 (7) Doing, or causing to be done, any of the things forbidden by this order through the medium of said Stevenson, Jordan and Harrison, Inc., Charles R. Steven-

son or D. M. Metzger, or any other corporation, firm or individual.

It Is Further Ordered that Stevenson, Jordan and Harrison, Inc., and Charles P. Stevenson and D. M. Metzger as officers thereof, and their agents, servants, and employees, do forthwith cease and desist from doing or performing any of the things forbidden by this order, or aiding, assisting, or cooperating in the performance thereof.

It Is Further Ordered that nothing in this order is to be construed as prohibiting the respondents from entering into such contracts or agreements relating to the maintenance of resale prices as are not prohibited by the provisions of an Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (the Sherman Act), as amended.

It Is Further Ordered that for the reasons appearing in the findings as to the facts the complaint herein be, and hereby is, dismissed as to the following respondents: T. M. Harrison, C. H. Ferris, N. M. Perris, E. G. Ackerman, A. H. Dyer, R. E. Case, F. L. Sweetser, W. R. Guthrie, A. P. Nonweiler, S. M. Hudson, R. R. Bliss, L. B. Platt, and Howard Marvin.

By the Commission.

Otis B. Johnson,
Secretary.

63 And on the same day, to wit, the 15th day of July, 1948, there was filed in the Clerk's office of said Court a certain Proof Of Service Of Brief in words and figures following, to wit:

64 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—48-C-699) * *

PROOF OF SERVICE OF BRIEF.

The undersigned hereby acknowledges the receipt of a copy of the brief of the Defendant in support of the Motion for Summary Judgment heretofore filed herein by the Defendant this 15th day of July, A. D. 1948.

Otto Kerner, Jr.,
United States Attorney.

65 And on the same day, to wit, on the 15th day of July, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Michael L. Igoe, District Judge; appears the following entry, to wit:

66 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

On motion of the plaintiff by the United States Attorney it is

Ordered that leave be and it is hereby granted to the plaintiff to file a consolidated brief herein and that the time within which to file answer to the defendant's brief be and it is hereby extended to and including August 9, 1948.

67 And afterwards on, to wit, the 27th day of July, 1948, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion in words and figures following, to wit:

68 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—48-C-699) * *

MOTION.

Comes now International Salt Company, Defendant, by Charles H. G. Kimball, its attorney, and respectfully prays that an order may be entered extending the time within which said Defendant may file its brief in answer to the brief heretofore filed herein by Plaintiff in support of Plaintiff's Motion for Summary Judgment to and including August 9, 1948, per Stipulation filed herewith.

International Salt Company,
Defendant,
By Charles H. G. Kimball,
Its Attorney.

69 And on the same day, to wit, the 15th day of July, 1948, came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures following, to wit:

70 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

* * (Caption—48-C-699) * *

STIPULATION.

Comes now United States of America, Plaintiff, and International Salt Company, Defendant, by their respective attorneys and hereby stipulate that the time within which said Defendant, International Salt Company, may file its brief in answer to the brief heretofore filed herein by the Plaintiff in support of the Plaintiff's Motion for Summary Judgment, shall be extended to and including August 9, 1948.

United States of America,
Plaintiff.
By Otto Kerner, Jr.,
Its Attorney.

International Salt Company,
Defendant.
By Charles H. G. Kimball,
Its Attorney.

71 And on the same day, to wit, on the 27th day of July, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

72 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

On stipulation of the parties by counsel filed herein it is Ordered that the time of the defendant within which to file answering brief in re the plaintiff's motion for a summary judgment be and it is hereby extended to August 9, 1948.

73 And afterwards on, to wit, the 4th day of August, 1948, there was filed in the Clerk's office of said Court a certain Proof Of Service Of Brief in words and figures following, to wit:

74 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

PROOF OF SERVICE OF BRIEF.

The undersigned hereby acknowledges the receipt of a copy of Defendant's brief in reply to Plaintiff's brief heretofore filed herein in support of Plaintiff's Motion for Summary Judgment.

Otto Kerner, Jr.,
United States Attorney.

75 And afterwards on, to wit, the 19th day of August, 1948, there was filed in the Clerk's office of said Court a certain Memorandum Of The Honorable Philip L. Sullivan, District Judge, in words and figures following, to wit:

76 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-698-699) * *

MEMORANDUM.

These actions are before the Court upon complaint filed by the United States which seek the enforcement of an order of the Federal Trade Commission dated September 2, 1947, requiring the defendants, and other corporations named in that order, to file special reports with the Federal Trade Commission within thirty days from the date of service. The complaint also seeks judgment against defendants for forfeiture in the sum of $100.00 per day for each day from and after April 1, 1948, that defendants have failed to file with the Federal Trade Commission the reports required by the order of September 2, 1947.

Each defendant has answered and filed a motion for summary judgment. The Government also has filed its
77 motion for summary judgment. All parties are agreed

that there is no genuine issue as to any material fact involved in the case.

Since the issues of law raised by the pleadings in the two actions are identical, the Court is considering both cases as one.

The suits grow out of the order of the Federal Trade Commission dated September 2, 1947, requiring these two defendants among others to file special reports with the Commission, the order reciting that it was issued in the public interest pursuant to the authority granted the Commission by subsections (a) and (b) of Section 6 of the Federal Trade Commission Act, and pursuant to Rule XXVI of the Commission's Rules promulgated under subsection (g) of Section 6, claimed to implement the authority granted the Commission by subsection 6(b) "To require, by general or special orders, corporations engaged in commerce • • • to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing." The default order
78 of February 27, 1948, charging that defendants had failed to comply with the order of September 2, 1947, then followed.

Jurisdiction is founded on Section 9 of the Act which vests this Court with jurisdiction to command corporations to comply with any order of the Commission made pursuant to the Act, and on Section 10 which vests this Court with jurisdiction of suits of the United States for the recovery of forfeitures if corporations fail to file required reports within the time fixed by the Commission for filing the same.

Defendants in their answers have set out certain matters relating to a prior proceeding against them by the Commission under Section 5 of the Act, and it is agreed by both sides that the facts therein are as follows:

The Commission on September 18, 1940, issued its complaint under Section 5 of the Act charging defendants, and others, with engaging in an unlawful conspiracy to fix prices on, and to control the production of salt in connection with the sale and distribution of that commodity in

interstate commerce. Answers were filed by the defendants therein admitting the alleged conspiracy. On November 10, 1941, the Commission issued its order to cease and desist, requiring the defendants to discontinue the conspiracy alleged in the complaint and admitted in the answers. A petition for review of the Commission's
79 order was filed by the defendants in the Circuit Court of Appeals for the Seventh Circuit, which court rendered its opinion on March 8, 1943, reported as *Salt Producers Association* v. *Federal Trade Commission*, 134 Fed. (2) 354. On April 20, 1945, the Circuit Court of Appeals entered its decree modifying the Commission's order in certain respects, affirming it as modified and directing compliance therewith. On August 10, 1943, the Commission issued its modified order to cease and desist, as required by Section 5(i) of the Act, incorporating the changes directed by the Circuit Court of Appeals, and caused the same to be served on all of the defendants. In August, 1943, the respondents named in the decree of the Circuit Court of Appeals filed reports with the Commission showing the manner and form in which they were complying with the court's decree.

On September 2, 1947, the Commission alleges that it believed it was in the public interest to make a further investigation of the manner and form of compliance, and in aid of that investigation, pursuant to Sections 6(a) and 6(b) of the Act in aid of enforcement proceedings in Docket No. 4320 under Section 5 of the Act and pursuant to the Commission's Rule XXVI, issued its order requiring the defendants and others to file special compliance reports with the Commission within thirty days from the date of service, which was had on September 4, 1947. Later
80 the Commission by letter order extended the time until November 1, 1947. The Government urges that the reports were not filed and that separate notices of default, as it insists is provided for in Section 10 of the Act, as a prerequisite to subjecting defendants to the $100.00 a day forfeiture for failure to file, were issued by the Commission on February 27, 1948, and served on each defendant on March 1, 1948. The Commission alleges that the thirty days specified in Section 10 and in the notices expired on April 1, 1948, and insists that defendants' failure to file the required reports continued, and that each defendant notified the Commission writing that it would not comply with the

order, and therefore these suits were filed to compel them to do so and to obtain judgment in favor of the United States for $100.00 per day from each for each day they are in default.

In their answers the defendants set out that pursuant to the requirements of the final decree of the United States Circuit Court of Appeals for the Seventh Circuit, defendants filed their reports of compliance with the Federal Trade Commission, and that the Commission received said reports without making any objection thereto. That the order of September 2, 1947, does not require them to file an annual or special report within the meaning of Section
81 10 of said Act. That the procedure sought to be pursued by the Federal Trade Commission is not reflected or set forth in any Rule of said Federal Trade Commission, and has not been published in the Federal Register, as required by Section 3 of the Administrative Procedure Act, and that pursuant to the order of September 2, 1947, each defendant has filed an additional compliance report, by stating that it is complying in the same manner set out in its original compliance report.

The Commission insists that the present suits in ths court have nothing whatsoever to do with the prior proceeding under Section 5 of the Act, except insofar as the Commission's authority to investigate compliance with the decree and modified order to cease and desist have been questioned. The Commission insists that these suits are not for the purpose of enforcing compliance with the decree of the Circuit Court of Appeals or the Commission's modified order to cease and desist, nor have the defendants been charged with a violation of that decree or modified order. That the Commission is only seeking by an investigatory process authorized by law, to obtain the facts as to the manner and form in which defendants have complied with that decree and modified order.

Defendants urge that there is no published rule or statement of procedure of the Commission which specifies,
82 outlines or even refers to the use of Sections 6(a) and 6(b) or Section 10 of the Federal Trade Commission Act in aid of decrees entered under Section 5 of the Act, nor is there any reference in the Commission's Rules and Statements of Procedure to the procedure followed in the present proceedings. The former proceedings referred to as Docket No. 4320 when the matter was before the Fed-

eral Trade Commission, and as Case No. 7909 when it was in the Circuit Court of Appeals, were brought by the Federal Trade Commission under Section 5 of the Federal Trade Commission Act, and when the matter was on appeal before the Circuit Court of Appeals, that court, in its decree, reserved "jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof. * * *"

Section 5 of the Federal Trade Commission Act itself provides for enforcement proceedings with respect to decrees entered thereunder, and subsection (1) thereof reads:

> "(1) any person, partnership or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

83 A careful reading of the legislative history of the Act shows that Section 6 is only to be invoked in support of general economic surveys and not in aid of enforcement proceedings under a Section 5 decree. The Section 10 penalty provisions, on which the present proceeding is based, can be invoked only in connection with general economic survey proceedings under Section 6, and not in connection with enforcement proceedings under Section 5.

Where an appeal has been taken to the Circuit Court of Appeals, as was done in Docket No. 4320, Section 5 gives to the Circuit Court of Appeals sole jurisdiction of enforcement proceedings thereunder, and that court in order to enforce compliance with its decree specifically reserved jurisdiction of the cause, subject only to the Commission's right to pursue contempt proceedings in the Circuit Court of Appeals, or to collect the civil penalty provided by Section 5(1).

The commission's order of September 2, 1947, here involved, required these defendants to "file additional reports showing in detail the manner and form in which it has been and is now complying with said modified order to cease and desist." On October 31, 1947, these defendants advised the Commission in writing that they were complying in the same manner as set forth in their original compliance re-

ports filed in 1943, to which original reports no objec-
84 tion had ever been made by the Commission. The September 2, 1947 order also required the defendants, as a part of their additional reports, to submit a complete statement "of the prices, terms and conditions of sale of salt, together with books or compilations of freight rates used in calculating delivered prices, price lists and price announcements distributed, published or employed in marketing salt from and after January 1, 1944."

Sections 6(a) and 6(b) provide for economic reports. Section 6(a) provides: "That the Commission shall also have power

> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relations to other corporations and to individuals, associations, and partnerships.
>
> (b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or
85 answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

A reading of the legislative history of Sections 6(a) and 6(b) convinces me that these sections are designed for the purpose of compelling corporations to make annual reports, and giving the Commission authority within its discretion to require special reports when it deemed that advisable, but is not related in any way to the enforcement of the law. The Federal Trade Commission Act, Section 10, provides

that corporations shall be subject to the forfeiture of $100.00 a day only for failure to file annual reports and special reports when required by the Commission, in conformity with Section 6, but has no relation to the jurisdiction conferred by Section 5. At least two courts have in effect specifically denied the existence of any relationship between Section 5 and Section 6 of the Act. *Federal Trade Commission* v. *Miller's National Federation*, 47 Fed. (2) 428, where the court said:

> "The power of investigation conferred upon the Commission by Section 6 is different in character from the jurisdiction conferred by Section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation."

And in *Federal Trade Commission* v. *Claire Furnace*
86 *Co.*, 274 U. S. 160, where the Supreme Court makes the same distinction, quoted in this memorandum *infra*.

When Congress enacted the Federal Trade Commission Act the duties and powers of the new Commission seem to have been divided into two categories. The first category continued the power of investigation and publicity with respect to corporations formerly lodged in its predecessor, the Bureau of Corporations, and now contained in Sections 6(a) and 6(b) of the present Act. However, Congress added a new section, Section 10 providing for a forfeiture of $100.00 a day for failure to file the reports provided for in Sections 6(a) and 6(b). The second category into which the duties of the Federal Trade Commission were divided was provided by Section 5 which prohibits unfair methods of competition and provides the method for its enforcement and penalties. Subsection (a) of Section 5 provides that unfair methods of competition in commerce and unfair and deceptive acts or practices in commerce are declared to be unlawful, and also provides that the Commission has power to prevent the use of such unfair methods. Subsection (b) sets out the jurisdiction and procedure by which the Commission may prosecute acts involving unfair methods of competition. Subsection (c) provides the appellate procedure available to respondents against whom a cease and desist order has been entered. Subsection (d)
87 provides that "The jurisdiction of the Circuit Court of Appeals of the United States to affirm, enforce,

modify, or set aside orders of the Commission shall be exclusive." Subsections (g), (h), (i) and (j) set out the points of time at which a cease and desist order of the Commission becomes final.

I find nothing in Section 5 which gives the Commission power to modify or attempt to enforce, independently of the Circuit Court of Appeals, its original cease and desist order of 1943. Section 5 of the Federal Trade Commission Act is self-sufficient for enforcement proceedings with respect to decrees entered thereunder, and therefore the remedies available to the Commission are contempt proceedings in the Circuit Court of Appeals or penalty proceedings under Section 5(1) of the Act.

The United States contends that the Commission's order of September 2, 1947 indicates that the purpose of the Commission's investigation was to determine the manner and form of compliance with the Commission's modified order to cease and desist of November 10, 1941. That the Commission's order of September 2, 1947 only asked that the defendants file reports indicating the manner and form of defendants' compliance with the modified order of the
88 Commission to cease and desist and with the decree of the Circuit Court of Appeals. Defendants did file an additional compliance report with the Commission setting out that they were complying in the same manner as set forth in their original compliance reports filed in 1943. What defendants did not file is the documentary evidence requested by the Commission and not covered by Section 10 at all. Section 10 provides that only upon the failure of a corporation to file the annual or special reports referred to therein shall the penalty provision become operative. *United States* v. *National Biscuit Company*, 25 Fed. Supp. 329.

Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160, was a bill in equity brought by various coal, steel and related industries to enjoin the Federal Trade Commission from enforcing order issued by the Commission requiring those companies to furnish monthly reports of production, balance sheets and other voluminous information in detail. Without questioning appellee's right to seek relief by injunction, the Federal Trade Commission answered, admitting the issuance of the orders, claiming authority therefor under Section 6, and 9, Federal Trade Commission Act. The cause was heard on a motion to strike

the answer, the court holding the answer insufficient, and granted the injunction. The Supreme Court said:

89 "Appellees were not charged with practicing unfair methods of competition (Section 5, Act of September 26, 1914) or violating the Clayton Act * * *. Orders under such charges can be enforced only through a Circuit Court of Appeals * * *.

"The action of the Commission here challenged must be justified, if at all, under the paragraphs of Sections 6 and 9, * * * and the only methods prescribed for enforcing orders permitted by any of these paragraphs are specified in Sections 9 and 10. They are applications to the Attorney General to institute an action for mandamus and proceedings by him to recover the prescribed penalties."

Sections 6(a) and 6(b) of the Act provide for economic investigations by the Commission from time to time as to the organization, business, conduct, practice and management of any corporation engaged in commerce, and for the filing of annual or special reports. The penalty applicable for failure to file these reports has no relation to failure to comply with an order requiring information as to the manner in which an order to cease and desist is being observed, and the supplemental compliance report here involved is not one required by the Act and is clearly not the kind of report set out in Section 6(a) or Section 6(b).

Defendants concede, and I agree, that notwithstanding the reservation of jurisdiction by the Circuit Court of Appeals in its decree, the Commission may investigate

90 any violations which it has reason to believe defendants are committing. In order to accomplish this the Commission may file a new complaint against defendants, alleging in what manner it considers that defendants are violating the Act. Or penalty proceedings under Section 5(1) may be initiated by the United States for alleged violations of the former decree in the Circuit Court of Appeals. Or contempt proceedings may be brought in the Circuit Court of Appeals.

The Commission insists that this is not a Section 5 proceeding, nor is it an attempt on the part of the Commission to enforce the decree of the Circuit Court of Appeals or the Commission's modified order to cease and desist; that it is purely an investigation to determine whether the defendants are complying with the former decree and the

Commission's order. It seems to me, however, that the Commission is attempting indirectly to use the power given to it under Section 5 in order to secure the information it seeks under Section 6(a) and 6(b).

The Commission insists that under Section 6(g) it has the power to make rules and regulations for the purpose of carrying out the provisions of this Act. That under this authority it has promulgated Rule XXVI providing for the filing of reports and supplemental reports showing
91 compliance with the Commission's orders. Defendants challenge this authority on the ground that nowhere in the Act is any statutory authority given to the Commission to require either compliance or supplemental compliance reports. The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6(b).

Subparagraph (a) of Rule XXVI provides for an original report of compliance with the Commission's cease and desist order. Subparagraph (b) sets out the right of the Commission to require from time to time, further supplemental reports of compliance. Subparagraph (c) provides how the reports shall be signed. Defendants urge that no court has ever declared this rule to be lawful, valid and enforceable; and that not until the present time, almost thirty-four years after the enactment of the Federal Trade Commission Act, has the Commission made an attempt to enforce subparagraph (b) thereof in a Section 5 proceeding. Nowhere in Section 5 can I find any reference whatever to compliance reports. Section 5 provides for the finality of a cease and desist order as soon as the jurisdiction of the Federal Trade Commission over it has been transferred to the Circuit Court of Appeals, but nowhere does Section 5 confer upon the Commission authority
92 to make rules, and no rule-making paragraph of any statute could confer upon an administrative body authority to substantially alter the explicit provisions of a statutory enactment such as Section 5 of the Federal Trade Commission Act.

For all of the reasons set out herein I am of the opinion that plaintiff's motion for summary judgment for a mandatory injunction commanding defendants to file the reports requested by the Commission's order of September 2, 1947, and for judgment against the defendants in the amount of

$100.00 a day for each day from and after April 1, 1948, should be denied.

Defendants' motions for summary judgment that defendants are not liable for the $100.00 a day penalty are allowed, and the complaint herein is dismissed for the reason that I believe this Court is without jurisdiction to entertain the same.

Philip L. Sullivan,
Judge.

August 19, 1948.

93 And afterwards, to wit, on the 20th day of August, 1948, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit:

94 In the District Court of the United States.

* * (Caption—48-C-699) * *

ORDER.

This Cause Coming On To Be Heard on the complaint and the answer heretofore filed herein, and on the motion for summary judgment, with a supporting affidavit, heretofore filed herein by the plaintiff, and on the motion for summary judgment, with a supporting affidavit, heretofore filed herein by the defendant, and on the brief and answering brief of the plaintiff, and on the brief and answering brief of the defendant, and there being no genuine issue as to any material fact involved in this case, and the Court being fully advised in the premises, and, under date of August 19, 1948, this Court having issued and filed its memorandum opinion and decision herein:

It Is, Therefore, Adjudged, Ordered and Decreed that the plaintiff's motion for summary judgment for a mandatory injunction commanding the defendant to file the report requested by the Commission's order of September 2, 1947, more fully described in said memorandum opinion and decision, and for judgment against the defendant in the amount of $100 a day for each day from and after April 1, 1948, be and the same hereby is denied; and

95 Be It Further Ordered, Adjudged and Decreed that the defendant's motion for summary judgment that defendant is not liable for the $100 a day penalty be and the same hereby is allowed, and judgment is hereby entered for the defendant and against the plaintiff with respect thereto; and that defendant's motion for summary judgment that it is not liable to file the report requested by the said Commission's order of September 2, 1947, be and the same hereby is allowed, and with respect thereto the complaint herein is dismissed for lack of jurisdiction of this Court.

Enter:

Philip L. Sullivan,
Judge.

Dated: August 20, 1948.

96 And afterwards on, to wit, the 15th day of October, 1948, came the Plaintiff by its attorneys and filed in the Clerk's office of said Court its certain Notice of Appeal in words and figures following, to wit:

97 In the United States District Court
For the Northern District of Illinois,
Eastern Division.

United States of America,
Plaintiff,
vs.
International Salt Company,
Defendant.
} No. 48 C 699.

NOTICE OF APPEAL.

The United States of America, plaintiff-appellant, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 20, 1948, dismissing plaintiff-appellant's complaint.

Otto Kerner, Jr.,
United States Attorney.

October —, 1948.

(Attached Hereto Is the Following Certificate:)

98 IN THE DISTRICT COURT OF THE UNITED STATES,

For the Northern District of Illinois,

Eastern Division.

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 18th day of October, 1948, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District Courts of the United States, I mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Ashcraft and Ashcraft
Charles H. G. Kimball
134 S. La Salle Street
Chicago, Illinois

Roy H. Johnson,
Clerk.

(Seal)

99 And on the same day, to wit, the 3rd day of November, 1948, came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Statement of Points on Appeal in words and figures following, to wit:

100 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—48-C-699) * *

PLAINTIFF-APPELLANT'S STATEMENT OF POINTS ON APPEAL

Comes now the United States of America, plaintiff-appellant in the above-entitled cause, and says that it relies upon the following points in the prosecution of its appeal from the final judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 20, 1948.

1. The District Court erred in holding that this action

was instituted for the purpose of enforcing compliance with a modified order to cease and desist issued by the Federal Trade Commission.

2. The District Court erred in holding that this action was instituted for the purpose of enforcing compliance with a decree of the Court of Appeals for the Seventh Circuit.

3. The District Court erred in holding that the order of the Federal Trade Commission dated September 2, 1947, did not initiate an investigation authorized by subsections (a) and (b) of Section 6 of the Federal Trade Commission Act and by Rule XXVI of the Rules of Practice of the Federal Trade Commission.

101 4. The District Court erred in holding that the supplemental compliance report sought by the Federal Trade Commission through its order dated September 2, 1947, is not the kind of report set out in subsection (a) or subsection (b) of Section 6 of the Federal Trade Commission Act.

5. The District Court erred in holding that the Federal Trade Commission had no authority to investigate compliance with an order to cease and desist issued by the Federal Trade Commission by issuing a special order requiring the defendant to file a special report.

6. The District Court erred in holding that Section 6 of the Federal Trade Commission Act is only to be invoked in support of general economic surveys.

7. The District Court erred in holding that subsection (b) of Section 6 may not be invoked by the Federal Trade Commission in connection with investigations of compliance with orders to cease and desist issued by the Federal Trade Commission against corporations under Section 5 of the Federal Trade Commission Act.

8. The District Court erred in failing to hold that the Federal Trade Commission has the inherent power under Section 5 of the Federal Trade Commission Act to require reports of compliance with orders to cease and desist issued under that section.

9. The District Court erred in holding that the Federal Trade Commission had no authority to promulgate Rule XXVI of its Rules of Practice for the purpose of carrying out the provisions of Section 5 of the Federal Trade Commission Act.

102 10. The District Court erred in stating that it was the position of the Federal Trade Commission "that

Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6 (b)."

11. The District Court erred in holding that subsection (g) of Section 6 of the Federal Trade Commission Act authorizes the Federal Trade Commission to promulgate rules only for the purpose of carrying out the provisions of Section 6, and does not authorize the Federal Trade Commission to promulgate rules for the purpose of carrying out the provisions of Section 5 and the remaining sections of the said Act.

12. The District Court erred in failing to hold that the Federal Trade Commission has the inherent power to promulgate rules of practice for the purpose of carrying out the provisions of all of the sections of the Federal Trade Commission Act.

13. The District Court erred in holding that Sections 5 and 6 of the Federal Trade Commission Act must be considered separately and that the powers conferred by Section 6 are wholly unrelated to the powers conferred by Section 5.

14. The District Court erred in holding that the only methods of investigating compliance with orders to cease and desist issued by the Federal Trade Commission are by issuing new complaints, by initiating civil penalty proceedings under subsection (1) of Section 5 of the Federal Trade Commission Act, and by initiating contempt proceedings in a court of appeals for violation of decrees affirming and enforcing the said orders to cease and desist.

103 15. The District Court erred in taking into consideration the legislative history of an Act of Congress where the language of the statute is clear and unambiguous and permits only one interpretation.

16. The District Court erred in holding that the legislative history of subsection (b) of Section 6 of the Federal Trade Commission Act indicates that Congress intended that the subsection be invoked only in connection with general economic surveys being conducted by the Federal Trade Commission.

17. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act applies only to a failure of corporations to file reports required by the Federal Trade Commission in general economic surveys.

18. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act was not applicable to a failure to comply with an order requiring information as to the manner in which an order to cease and desist is being observed.

19. The District Court erred in holding that the forfeiture provision of Section 10 of the Federal Trade Commission Act was not applicable to a failure to attach copies of price lists, freight rate books and terms and conditions of sale to a special report required by the Federal Trade Commission.

20. The District Court erred in holding that it had no jurisdiction to entertain the suit.

21. The District Court erred in entering that final judgment herein.

22. The District Court erred in denying plaintiff's motion for summary judgment.

23. The District Court erred in allowing defendant's motion for summary judgment.

Wherefore, the plaintiff-appellant, the United States of America, prays that the said final judgment in this cause may be reversed, and for such other and further relief as may be just in the premises.

Otto Kerner, Jr.
United States Attorney
Chicago, Illinois

John P. Lulinski
Assistant United States Attorney
Chicago, Illinois

J. Stephen Doyle, Jr.
Special Assistant to the Attorney General
United States Department of Justice
Washington, D. C.

Joseph S. Wright
Assistant General Counsel
Federal Trade Commission
Washington, D. C.

J. B. Truly
Special Attorney
Federal Trade Commission
Washington, D. C.

105 And afterwards on, to wit, the 3rd day of November, 1948, came the Plaintiff-Appellant by its attorneys and filed in the Clerk's office of said Court its certain Designation of Record on Appeal in words and figures following, to wit:

106 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—48-C-699) * *

DESIGNATION OF RECORD ON APPEAL.

United States of America, plaintiff-appellant, designates the entire record for transmittal on appeal.

Otto Kerner, Jr.,
United States Attorney.

November 3, 1948.

107 Northern District of Illinois
Eastern Division } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Designation of Record On Appeal filed in this Court in the cause entitled: United States of America, Plaintiff, *vs.* International Salt Company, Defendant, No. 48-C-699, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 10th day of November, 1948.

(Seal)

Roy H. Johnson,
Clerk.
By Gizella Butcher,
Deputy Clerk.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of the record, filed in this Court on December 30, 1948, in

Cause No. 9754

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

INTERNATIONAL SALT COMPANY, DEFENDANT-APPELLEE

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of May, A. D. 1949.

[SEAL] (S.) KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the fifth day of October, in the year of our Lord, one thousand, nine hundred and forty-eight, and of our Independence the one hundred-seventy-third.

No. 9754

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

INTERNATIONAL SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

And afterward, to-wit, on the eleventh day of March, 1949, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

March 11, 1949

Before: Hon. J. Earl Major, Chief Judge

No. 9753

United States of America, plaintiff-appellant,

vs.

Morton Salt Company, defendant-appellee

No. 9754

United States of America, plaintiff-appellant,

vs.

International Salt Company, defendant-appellee

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

Pursuant to stipulations of counsel, it is ordered:

(1) That the above entitled appeals be consolidated for the purposes of oral argument;

(2) That the plaintiff-appellant be allowed one hour and fifteen minutes for oral argument and the two defendants-appellees be allowed an aggregate of one hour and fifteen minutes for oral argument, with the latter time to be divided between the defendants-appellees as they see fit; and

(3) That the oral argument for the consolidated hearing in these cases be set for Tuesday, April 12, 1949, at 9:30 A. M.

And afterward, to-wit, on the twentieth day of May, 1949, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1948, APRIL SESSION, 1949

Nos. 9753-9754

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

MORTON SALT COMPANY, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

INTERNATIONAL SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

May 20, 1949

Before MAJOR, *Chief Judge*, MINTON and DUFFY, *Circuit Judges*

MAJOR, *Chief Judge:*

This action was commenced by the United States against numerous defendants, including International Salt Company and Morton Salt Company. From an adverse judgment entered August 20, 1948, the government separately appealed as to these two defendants. Only issues of law are involved in each appeal, and, being identical, they may appropriately be considered and disposed of in a single opinion.

The action, according to the compiaint, was instituted by the Attorney General upon request of the Federal Trade Commission (hereinafter called the Commission) for the enforcement of a Commission order "requiring additional reports of compliance," and to recover forfeitures for failure of defendants to comply with such order. The action is predicated upon Title 15 U.S.C.A. Sec. 49,[1] which vests the several District Courts of the United States with jurisdiction to direct a corporation to comply with an order issued by the Commission, and Sec. 50, which vests any District Court with jurisdiction of suits by the United States for the recovery of for-

[1]Section numbers used in this opinion, unless otherwise noted, refer to the Federal Trade Commission Act, Title 15 U.S.C.A.

feitures if a corporation fails to file any report so required within the time fixed by the Commission.

The order sought to be enforced was issued by the Commission on September 2, 1947, under the authority asserted to reside in Rule XXVI, promulgated by the Commission, and Sec. 46 (a) and (b) of the Act. The complaint sets forth verbatim the order relied upon and the notice of default served on the defendants. There are attached to the complaint numerous exhibits, including a copy of Rule XXVI.

The court below in a well reasoned opinion held that it was without jurisdiction to entertain the cause of action. United States v. Morton Salt Co. and International Salt Co. v. United States, 80 F. Sup. 419. This holding was predicated upon the conclusion that the Commission's order of September 2, 1947, was invalid because issued without authority. It is obvious, so we think, that the right to maintain the instant action is dependent upon the validity of the order.

The issue thus presented calls for a further statement of the factual situation. On September 18, 1940, the Commission issued its complaint under Sec. 45, charging defendants and others with engaging in an unlawful conspiracy to fix prices on and to control the production of salt in connection with the sale and distribution of that commodity in interstate commerce. On November 10, 1941, the Commission issued its order to cease and desist, requiring the defendants to discontinue the conspiracy alleged in the complaint. A petition for review of the Commission's order was filed by the defendants in this court which rendered its opinion March 8, 1943. Salt Producers Association v. Federal Trade Commission, 134 F. 2d 354. On April 20, 1943, this court entered its decree modifying the Commission's order in certain respects, affirming it as modified and directing compliance therewith. In effect, this court by its decree enforced the modified cease and desist order under Sec. 45 and commanded these defendants (as well as the others) to obey said decree, without prejudice to the right of the Commission to initiate contempt proceedings or penalty proceedings under Sec. 45 (l), and it required the defendants to file a compliance report within ninety days and reserved to this court "jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof * * *." Within the time thus designated in the decree of this court, each of the defendants filed a report with the Commission showing the manner and form in which they were complying with the court's decree. In the interim, during a period of more than five years, no question has been raised by the Commission as to the form or content of such compliance reports, and during said period the defendants have not been charged with a violation of the decree of this court and no

request has been made by the Commission that this court order or direct an investigation into defendants' conduct.

The government apparently senses the insecurity of its position if it be held that the order sought to be enforced was in aid of or for the purpose of enforcement either of the decree of this court on the Commission's cease and desist order modified to conform therewith. And so any such purpose on the part of the Commission is disclaimed. There was no attempt, so it is asserted, to enforce either the court's decree or the Commission's order, but "the sole purpose of the order requiring the reports was to inquire as to the manner of compliance by defendants with the Commission's modified order to cease and desist * * and this Court's decree enforcing that order." We have some difficulty in following a theory that the purpose was merely to obtain information as to whether defendants have been violating the decree of this court and at the same time denying that such purpose bears any relation to its enforcement. We are informed that if the defendants are shown to have violated the order of the Commission modified in conformity with the decree of this court, two courses are open, (1) it can certify the facts to the Attorney General under Sec. 56 of the Act, requesting that he file a civil suit seeking civil penalties under the provisions of Sec. 45 (l), or (2) it can petition this court for a rule requiring defendants to show cause why they are not in contempt of court.

We, as the court below, do not agree with the government's contention that the Commission initiated a new investigation. The record plainly discloses that the controverted order was issued in connection with and as a part of the proceeding theretofore had under Sec. 45; in fact, the order itself calls for "an additional and supplemental report showing the manner and form of compliance with the modified order to cease and desist entered by the Commission on August 10, 1943, and with the decree of the Circuit Court of Appeals for the 7th Circuit entered on April 22, 1943." "Additional and supplemental" to what? The answer must be that such reference was to the report of compliance required by the decree of this court and that the order was only a further step in the proceeding of which this court retained jurisdiction. Any doubt in this respect is dispelled by the fact that the order of September 2, 1947, is given the same title and docket number as the Commission's original order dated November 10, 1941.

As already noted, this court retained jurisdiction "to enter such further orders * * as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof." The jurisdictional reservation thus provided was in conformity with Sec. 45 of the Act; in fact, a reading of this section discloses in unmistakable fashion that every vestige of jurisdiction over a proceeding such as that under discussion was definitely

lodged with the Court of Appeals. The court is given the power to enter a decree "affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed," and "the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." It is also provided, "The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari." Not only was the court endowed with jurisdictional power, but by subsection (d) it was provided that such jurisdiction "shall be exclusive."

Thus, with enforcement jurisdiction so firmly and exclusively lodged in a Court of Appeals both by the statute and decree of the court, it would seem that one who asserts such jurisdiction to reside elsewhere is confronted with a heavy burden which can be met only by a rule or statutory provision, which makes clear a legislative purpose to impair or divide the jurisdictional responsibility provided in Sec. 45. Language which only confuses the situation or raises a doubt should not be accepted as sufficient.

An analysis of Sec. 46 furnishes no sound basis for the contention either that it can be utilized as an aid to a proceeding under Sec. 45 or that it was intended to impair or detract from the unambiguous and exclusive jurisdictional provision of that section. Sec. 46, so far as relevant, empowers the Commission in paragraph (a) "To gather and compile information concerning, and to investigate * * the organization, business, conduct, practices, and management of any corporation * * and its relation to other corporations and to individuals, associations and partnerships," and in paragraph (b) "To require, by general or special orders, corporations, * * or any class of them, or any of them * * to file with the commission * * annual or special, or both annual and special, reports or answers in writing to specific questions * *" which will inform the Commission regarding the business affairs of those corporations, and the "relation" thereof "to other corporations, partnerships, and individuals * *."

Not only does the language fail to reveal any interdependence of the two sections, but the opposite is indicated. Sec. 46 is directed solely to a "corporation," while Sec. 45 refers to any "person, partnership or corporation." Also, Sec. 46 is concerned with "annual or special, or both annual and special, reports," while Sec. 45 makes no mention of reports but leaves it to the court to "issue its own order commanding obedience to the terms of such order of the Commission."

Both sides have set forth, particularly with reference to Secs. 45 and 46, a large amount of legislative history, a discussion of which would serve no useful purpose. It can be safely said, however, that such history discloses that Secs. 45 and 46 were not intended as com-

plementary but were designed as separate and distinct, each directed to different situations. The dual purposes embodied in the two sections were recognized in F.T.C. v. Millers' National Federation, 47 F. 2d 428, 429, wherein the court stated: "The power of investigation conferred upon the Commission by section 6 is different in character from the jurisdiction conferred by section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative function, or for the President in aid of recommending necessary legislation." See also F.T.C., et al. *v.* Claire Furnace Co., et al., 274 U. S. 160, 170.

The report required by the controverted order, as already noted, calls for "an additional or supplemental report showing the manner and form of compliance," while Sec. 46 is limited to "annual or special reports." In order to bridge this gap we are urged to hold that there is no difference between "an additional or supplemental report" and a "special report." We are not impressed with this reasoning. It seems reasonably plain to us that the term "special report," as used in Sec. 46, means something entirely different and distinct from "an additional or supplemental report showing the manner and form of compliance." This view is strengthened from the fact that Sec. 50, upon which the instant forfeiture action is predicated, provides for recovery for failure to file "any annual or special report * * * within the time fixed by the Commission." It is of significance that this forfeiture section and Sec. 46 characterize the report precisely in the same manner. No forfeiture is provided for failure to file "an additional or supplemental report," as called for by the Commission's order in the instant matter. In fact, reports so designated are not, so far as we are aware, referred to any place in the Act.

Admittedly, the report required by the Commission's order in the instant matter is not an "annual report," and we think it equally plain that it is not a "special report." This view finds support in the House Committee's report on interstate and foreign commerce (Report No. 533, 63rd Congress, 2nd Session), wherein annual and special reports are discussed. The congressional committee stated the purpose in authorizing the Commission to require special reports as follows: "The Commission under this section may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in its annual report does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by special report such additional information as the Commission may deem necessary." It thus appears that the purpose of the "special report" was to enable the Commission to obtain information which had not been furnished in the "annual report." In other words, the "special report" was intended as additional or

supplemental to the "annual report" but not as additional or supplemental to an order of compliance under Sec. 45.

Irrespective, however, of Sec. 46, the Commission argues that its order is authorized by Rule XXVI. The substance of this rule is contained in two unnumbered paragraphs. The first paragraph requires that a report of compliance be made to the Commission within sixty days (1) after a cease and desist order has been issued by the Commission, or (2) where the parties stipulate to cease and desist. This paragraph contains a proviso as follows: "* * provided, however, that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination * *." We do not understand the government to contend that this paragraph is of any aid to its contention in the instant situation. Obviously, it is not because reports of compliance were made by the defendants within the time fixed by the court. It is interesting to note, however, that this court in its decree fixed ninety days within which the defendants were required to comply rather than the sixty days provided in the rule. It would seem either that the rule was not called to the court's attention or that it was ignored. And we have no doubt that the sixty-day limitation contained in this proviso was not binding upon the court, which had the authority to fix such time for compliance as it saw fit.

The Commission relies upon the second paragraph of the rule, which provides:

> "Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation."

The scope of this rule appears to depend upon what is meant by "such order * * and any party entering into such stipulation." Does it refer only to an order entered by the Commission and a party entering into a stipulation as provided for in the first paragraph of the rule, or does it include a court decree or an order of the Commission merged therein, as the plaintiff here contends?

The Commission, in support of its authority, relies upon Sec. 46 (g), which provides:

> "From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."

Thus, two powers are conferred upon the Commission, (1) to classify corporations and (2) to make rules and regulations, and such

powers are joined by the conjunction "and," which would indicate that the latter power is related to the former. As already noted, it is only Sec. 46 which is limited to corporations, while Sec. 45 includes any "person, partnership, or corporation." If the plaintiff's contention be accepted that the Commission is authorized by this provision to promulgate a rule directed to the enforcement of Sec. 45, then the exclusive jurisdiction which that section confers upon courts becomes little more than an empty gesture. We need not labor this point, however, because what we have said concerning Sec. 46 as it relates to Sec. 45 is also pertinent to Rule XXVI. In our view, the authority contained in Sec. 46 (g) must be limited to Sec. 46. Use of language which indicates a broader scope is not difficult to understand because at the time of the insertion of Sec. 46 (g) there was no Sec. 45, and when the latter section was added there was a failure to remove or modify Sec. 46 (g). If the latter section be given the scope urged by the plaintiff, the Commission would have the authority by rule to impair or share the "exclusive jurisdiction" which is expressly conferred upon the courts by Sec. 45.

And it appears that the plaintiff in the lower court placed no such reliance upon this rule as it does here. At any rate, that court (80 F. Sup. 419, 425) stated: "The Commission also insists that Rule XXVI has nothing to do with Section 5 compliance reports, but is only in aid of economic survey reports under Section 6 (b)." The plaintiff here insists that its position was misinterpreted and quotes from its brief in that court. We note, however, the following statement from its quotation: "This rule was promulgated under subsection (g) of Sec. 6 and implements the authority granted the Commission by subsection (b) thereof." In our view, that was the purpose of the rule and the extent of its intendment. We are of the view that it furnishes no support for the controverted order before us.

Plaintiff also argues that the Commission has the inherent power to require reports of compliance with its orders to cease and desist. We need not explore the validity of this argument as it is beside the point. We are not here concerned with the power of the Commission, inherent or otherwise, to enforce its own orders, but with its power to enforce or aid in enforcement of a decree of this court or an order of the Commission which has become merged in a decree of this court. This we think it had on its own initiative no power or authority to do.

The judgment appealed from is affirmed.

MINTON, *Circuit Judge*, dissenting.

A cease and desist order of the Federal Trade Commission that has become final without review or after review by this Court and is not complied with, may result in judgment by a District Court for a civil penalty under 15 U.S.C. Sec. 45(1) or enforcement pro-

ceedings before the reviewing Court of Appeals, 15 U.S.C. Sec. 45, (d). Noncompliance may result in dual action—one, for a penalty before the District Court; two, for enforcement by contempt proceedings by the Court of Appeals; or a choice between the two remedies. Punishment for past delinquencies would seem to lie with the District Court. Enforcement looking to the future would seem to lie with the Court of Appeals. Whether to proceed for punishment or enforcement, or both, would require someone to produce the facts. This is the Commission's job. As I understand the instant proceeding, it is not an attempt at enforcement of this Court's decree by the proceeding here instituted in the District Court, and is therefore by no stretch of imagination an interference with the exclusive jurisdiction of this Court to enforce its orders. The instant proceeding is an attempt by the Commission to get the facts upon which to base a judgment as to whether there has been compliance, which, if present, results in no further proceedings; or noncompliance, which, if present, may lead to action for penalty or enforcement, or possibly both.

Does the Act authorize the Commission to use the procedure it has adopted here to get the facts? We must assume that the Commission is unable to tell from the data furnished whether there has been compliance. Public officers are presumed to act in good faith until the contrary has been made to appear. The Commission finds the authority for the present procedure to obtain the facts under 15 U.S.C. Sec. 46 (a) and (b) and under Rule 26 [1] promulgated by the Commission. It is the position of the Commission that either the rule or the statute is sufficient to justify its action.

It seems to me that when Congress enacted the Federal Trade Commission Act, it was providing an integrated act and not a compartmentalized act, as the majority of this Court seems to think. In my view of the case, it is unnecessary to deal with Sec. 46 (a) and (b) and the narrow, restricted construction thereof, as indulged in by the majority of this Court. I find ample support for the procedure of the Commission contained in its rules, read in conjunction with the provisions of the statute. Sec. 46 (g) of the statute provides:

"Sec. 46. Additional powers of Commission.

"The commission shall also have power—

• • •

"(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41-46 and 47-58 of this title."

[1] 12 Fed. Reg. 5448, August 12, 1947.

This, it will be noted, is a part of Sec. 46 which the majority of this Court holds applies only to corporations. The section just quoted specifically refers to Secs. 41-46. Sec. 45, which is within this reference, deals with persons, partnerships, and corporations, and the cease and desist order here involved arose out of a Sec. 45 proceeding. It seems clear to me that Congress by Sec. 46 (g) gave a broad power to make rules for the carrying out of the provisions of the whole Act. Under this power, the Commission promulgated Rule 26, the pertinent provisions of which read as follows:

> "In every case where an order to cease and desist is issued by the Commission for the purpose of preventing violations of law and in every instance where the Commission approves and accepts a stipulation in which a party agrees to cease and desist from the unlawful methods, acts or practices involved, the respondents named in such orders and the parties so stipulating shall file with the Commission, within sixty days of the service of such order and within sixty days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation; *provided, however*, that if within the said sixty (60) day period respondent shall file petition for review in a circuit court of appeals, the time for filing report of compliance will begin to run de novo from the final judicial determination;
>
> • • •
>
> "Within its sound discretion, the Commission may require any respondent upon whom such order has been served and any party entering into such stipulation, to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order or with said stipulation."

We are dealing here with a cease and desist order that has been reviewed by this Court. The rules of the Commission provide that in such a case, the time for filing a report of compliance *begins to run* from the final judicial determination. Nothing is said as to *how long after the time commences to run* the report of compliance shall be filed with the Commission. Apparently the reviewing court's order fixes that time and in the instant case, this Court fixed it at ninety days. Obviously, this rule in no manner interferes with the jurisdiction of this Court to make or enforce its order. Under this rule, whose validity is not challenged here, and which rule has the effect of law, the Commission may require a party to such cease and desist order "to file with the Commission, from time to time thereafter, further reports in writing, setting forth in detail the manner and form in which they are complying with said order."

What the Commission did on September 2, 1947, in the instant case was to require the defendants to file within thirty days after the service of notice additional reports showing in detail the manner and form in which the defendants had been and were complying with the cease and desist order and the decree of this Court, together with some supporting data. On September 22, 1947, the Commission, at the request of one of the respondents in the cease and desist order, but not one of the defendants here, extended the time for filing the additional reports and data to November 1, 1947. The other eighteen respondents in the order complied. Apparently the Commission's procedure did not impress them as unusual. The defendants refused to comply and, being in default for more than thirty days after November 1, 1947, the Commission on February 27, 1948, served notice of default upon the defendants, and, upon their further failure to comply within thirty days, instituted the instant proceeding, pursuant to 15 U.S.C. Sec. 50, which provides:

> "If any corporation required by said sections to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day • • •."

This Sec. 50 refers to "special reports" required by "*said sections*," that is, Secs. 41-46 and 47-58 which are the essential provisions of the Act. True, the Commission's proceedings refer not to "special reports" but to "additional," "further" and "supplemental" reports. It seems to me to say the latter are not special reports is to indulge in a refinement in language that would not be countenanced even in a criminal proceeding. I think "additional," "further" and "supplemental" are the equivalent of "special," since they are all reports not required in the usual course.

The majority have stressed what it sees as an interference with this Court's jurisdiction to enforce its decree. This is a bit unsubstantial, it seems to me. If the facts obtained justify proceedings, the Commission might proceed only for the penalty under Sec. 45 (l). In that instance, the Commission would not have to consult this Court at all. If it sought enforcement it could only be in this Court in full recognition of its jurisdiction.

What this case adds up to is this: That the defendants have refused deliberately, and with full consciousness of the consequences, to comply with an order of the Commission made pursuant to lawful authority, and such deliberate refusal comes squarely within the punitive provisions of Sec. 50. The Commission's rules have been

published in the Code [2] as a part thereof, following 15 U.S.C. Sec. 45 (1946 Edition). Since the regulations, which are authorized by the statute, together with the statute authorized the procedure which the Commission has followed, the defendants have certainly not been misled. I would reverse the judgment of the District Court.

A TRUE COPY:

TESTE:

Clerk of the United States Court of Appeals for the Seventh Circuit.

And on the same day, to-wit, on the twentieth day of May, 1949, the following further proceedings were had and entered of record, to-wit:

United States Court of Appeals for the Seventh Circuit

May 20, 1949

Before

HON. J. EARL MAJOR, *Chief Judge,*
HON. SHERMAN MINTON, *Circuit Judge,*
HON. F. RYAN DUFFY, *Circuit Judge.*

No. 9754

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

vs.

INTERNATIONAL SALT COMPANY, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed.

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[2] The present rule is Rule 25 in the Code, the same number as in prior publications of the rule in 11 Fed. Reg. 7074-7075, June 26, 1946; 10 Fed. Reg. 7388, June 20, 1945.

United States Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the order of consolidation, opinion of the Court, and Judgment of the Court in Cause No. 9754, United States of America, Plaintiff-Appellant, vs. International Salt Company, Defendant-Appellee, as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifteenth day of July, A. D. 1949.

[SEAL] (S.) KENNETH J. CARRICK,

Clerk of the United States Court of Appeals for the Seventh Circuit.

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Supreme Court of the United States

Order allowing certiorari

Filed October 24, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas and Mr. Justice Minton took no part in the consideration or decision of this application.